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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 281

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

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Respondents.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

Petitioner, Los Angeles County Flood Control District, respectfully prays for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One, to review the judgment thereof, affirming the judgment of the Superior Court in *Southern California Gas Company, Southern Counties Gas Company of California v. Los Angeles County Flood Control District*, Los Angeles Superior Court No. 659797.

In order to improve and enlarge a natural watercourse the petitioner required the respondents to relocate their pipeline which was in the way of such improvement. The respondents relocated their line and sought reimbursement

of the cost from the District, on the ground that requiring such removal without reimbursement:

> "* * * was and is without due process of law and in violation of the rights vested in plaintiffs [respondents] by the Fourteenth Amendment to the Constitution of the United States. * * *."

The said Superior Court gave respondents judgment for such costs, and on appeal by the petitioner, the District Court of Appeal affirmed this judgment.

Citations to Opinions Below.

The memorandum opinion of the Superior Court is unreported and is printed as Appendix B, *infra*. The opinion of the District Court of Appeal will be published in 169 California Appellate Reports 2d (not yet published) and is now published in 169 Advance California Appellate Reports, pages 881, *et seq.*, and 338 Pacific 2d 29, *et seq.* It is printed as Appendix A, *infra*.

There are no other written opinions.

The judgment of the Court below, the District Court of Appeal of the State of California, in conformance with that court's practice, is the final paragraph of Presiding Justice White's opinion (App. A, p. 9, 169 A. C. A. p. 888, 338 P. 2d p. 34) which reads:

> "The judgment is affirmed."

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The judgment of the District Court of Appeal, here sought to be reviewed was rendered and entered April 24, 1959.

2. Timely filed petition for rehearing was denied on May 20, 1959. Timely filed petition for hearing in the Supreme Court of the State of California was denied on June 18, 1959.

3. The statutory provisions invoked as conferring on this Court jurisdiction to review the judgment in question by Writ of Certiorari are 28 United States Code, Section 1257, paragraph (3); 28 United States Code, Section 2101, paragraph (c) and that portion of sub-paragraph (a) of paragraph (1) of Rule 19 of the Rules of this Court, which provides:

> "(a) Where a state court has decided a federal question of substance * * * in a way probably not in accord with applicable decisions of this court."

Question Presented for Review.

When a natural watercourse must be enlarged to accommodate increased water flow from the watershed served by the watercourse, and the required enlargement necessitates the relocation of pipelines or other structures in the watercourse, is requiring the owners of such pipelines or other structures to make the necessary relocations at their own expense a taking of property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States?

Constitutional Provisions and Statutes Involved.

The Constitutional provision involved is that portion of Section 1 of the Fourteenth Amendment of the Constitution of the United States, which reads:

> "Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

It, also, will be necessary to consider Sections 13 and 14 of Article I of the State Constitution, printed at pages 13 and 14, of Appendix C, which also appear in the front of all of the Official Statutes of the State of California, beginning with the 1935 Statutes. Consideration will be given to Sections 2 and 16 of the Los Angeles County Flood Control Act, printed at pages 15 and 21, respectively, of Appendix C. Section 2 appears in Chapter 1251, page 3102, Official California Statutes of 1951, and Section 16 appears in Chapter 1139, page 2635, Official California Statutes of 1953. This Act also appears as Act 28 in Volume I, page 336, of the Appendix to West's Water Code (West Publishing Company, St. Paul, Minnesota), and as Act 4463, page 325, Volume I, Appendix to Deering's Water Code (Bancroft-Whitney Company, San Francisco, California).

Statement of the Case.

In 1947 the respondents, Gas Companies installed an underground 30-inch gas transmission pipeline which crossed a natural watercourse [R. Clk. Tr. p. 26, lines 7-12], known as La Canada Verde Creek [R. Clk. Tr. p. 23, line 16].

At the point of crossing of the watercourse, respondents' pipe originally was installed in the form of a dip or sag downward [R. Clk. Tr. p. 28, lines 24-29]. Subsequent

to its installation a portion of such pipe, as a consequence of natural erosion, became exposed and protruded vertically above the surface of the bed of this natural watercourse at the point of crossing [R. Clk. Tr. p. 23, lines 24-27; p. 28, line 29, to p. 29, line 7].

As a consequence of rains during the winter of 1951-52 during which La Canada Verde Creek and other streams and watercourses overflowed their banks and inundated public streets [R. Clk. Tr. p. 27, lines 11-14; p. 29, lines 8-14], petitioner, acting under the provisions of the Los Angeles County Flood Control Act (App. C, p. 15) and pursuant to the direction of its electors, undertook an extensive bond issue program, in cooperation with the County of Los Angeles, for, among other improvements, improvement of various natural watercourses including the one here involved, La Canada Verde Creek [R. Clk. Tr. p. 29, line 14, to p. 30, line 1].

In so doing and although effort was made to avoid the necessity therefor, it was, and all the parties to this action agreed that it was, necessary to change the position of respondents' pipeline [R. Clk. Tr. p. 30, lines 8-31]. The petitioner did, however, redesign its drainage improvement so as to decrease, as far as possible, the amount of change necessitated and to permit respondents' pipe to cross above petitioner's improvement and yet remain safely underground [R. Clk. Tr. p. 30, lines 26-31].

Since petitioner's project was designed and constructed to provide drainage only for the watershed naturally served by La Canada Verde Creek [R. Clk. Tr. p. 26, lines 14-17], since an improvement of that creek was necessary by reason of development of its watershed following construction of respondents' facility [R. Clk. Tr. p. 26, line 32, to p. 27, line 14], since respondents and

petitioner made studies as to the feasibility and practicability of designs for the needed drainage improvement which would avoid the necessity for relocation and modification of respondents' pipe, which studies showed such avoidance was neither feasible, practical, or possible [R. Clk. Tr. p. 30, lines 12, 13; p. 17, lines 25-27], and since respondents' pipe, if not relocated would have bisected petitioner's improvement [R. Clk. Tr. p. 23, line 32, to p. 24, line 2; p. 30, lines 8-12] the requiring of the relocation involved was necessary and reasonable.

Respondents at a cost of $6,660.98 and pursuant to an interim *status quo* agreement, preserving the rights of both parties [R. Clk. Tr. pp. 17, 18; p. 25, lines 5-18], made the necessary change in their pipe [R. Clk. Tr. p. 25, lines 23, 24]. They thereafter instituted this action to recover such cost, and obtained a judgment therefor which judgment was affirmed by the District Court of Appeal.

In their complaint, the respondents, as plaintiffs, alleged:

> "* * * the taking, damaging and appropriation of plaintiffs' said property without payment of just compensation therefor, including the cost of removal or relocation thereof, was and is without due process of law and in violation of rights vested in plaintiffs by the Fourteenth Amendment to the Constitution of the United States * * *." [R. Clk. Tr. p. 5, lines 23-28.]

At page 4 of their Respondents' Brief in the District Court of Appeal (a part of the record) Respondents asked:

> "4. Can the District ignore the provisions of Section 14 of Article I of the California Constitu-

tion and the Fourteenth Amendment to the United States Constitution which prohibits the taking of private property without compensation on the theory stated by the appellant that 'it was improving public property'?"

(Subsequently we shall show that the Court could not have relied on Section 14 of Article I of the State Constitution, alone, as an adequate non-federal ground.)

On page 25 of the same brief, respondents again cited the Fourteenth Amendment and at page 31, say:

"It has long been settled that the requirements of just compensation under Article I, Section 14 of the California Constitution and the Fourteenth Amendment of the United States are self-executing, so that compensation required by these constitutional provisions is required irrespective of whether the enactment out of which the claim arises provides for compensation."

Respondents continously maintained this position as appears in their Answer to Petition for Hearing, page 12 (a part of the record).

Reasons for Granting Writ.

Paradoxically, the flood control problem in semi-arid Southern California is acute.

The Los Angeles County Drainage Area Flood Control Report, United States Engineer Office, Los Angeles, California, September 1939, states at page 1:

"The Los Angeles County Drainage Area, owing to unfavorable topography, volume and occurrence of rainfall, and to advanced urban and suburban devel-

opment, is threatened by a more dangerous and destructive flood menace than any area of similar size in the United States."

At page 38 the report continues:

"* * * Prior to 1938 the greatest property damage recorded was that caused by the 1914 flood. The estimates of the loss at this time vary through wide limits. The Los Angeles County Flood Control's investigations, however, indicate that at least $10,000,000 damage resulted. A thorough field investigation has been made by the Los Angeles District to determine the damage caused by the 1938 flood. The total direct damage caused by the flood in the Los Angeles area amounted to $30,300,000.00, with additional indirect damage of $17,000,000. Of 825 bridges in the area, 59 were destroyed and 32 badly damaged. Damage to channel protection reached $5,350,000, residential property sustained a loss of $4,000,000, and highways and roads to the value of $4,400,000 were destroyed. In the 1934 flood, which was more or less localized in the La Crescenta-Montrose area, caused an estimated property loss of $6,600,000, in addition to which approximately 50 persons lost their lives * * *."

In a pamphlet entitled "Flood-Plain Zoning," issued by the former California State Planning Board, in June, 1942, Mr. Ralph B. Wertheimer, at page 5, says:

"The four-day storm of February 27 to March 3, 1938, was calamitious; 49 lives were lost and property damage estimated at $40,400,000 for the entire basin of the Los Angeles River, Rio Hondo, San Gabriel River and Ballona Creek. The American Red Cross reported aiding 5,680 persons at a cost of $156,362 in Los Angeles."

The need for adequate flood control still continues. At page 6 of Mr. Hedger's report on the Control of Surface Storm Water by Storm Drains and Drainage Channels, a certified copy of which was introduced as Plaintiffs' Exhibit 18, which has been certified as part of the record, and nine extra copies of which have been sent to this Court, Mr. Hedger said:

> "The unprecedented residential and commercial development which has taken place in Los Angeles County during the past decade has greatly aggravated the lack of storm runoff provisions and thereby emphasized the immediate need for adequate storm drains to protect homes, schools and highways and to permit continued development of the County as a whole * * *."

We invite the attention of this Court to the photographs printed on pages 62, 82 and 99 of that report.

That extensive flood control work is still necessary does not indicate that past work was inadequate. The need for flood control increases with increased residential, commercial, and manufacturing development.

At page 12 of the September, 1939 report, *supra*, of the United States Engineer's Office, this is explained as follows:

> "* * * From present trends, the future residence expansion will be toward the San Fernando Valley and along the foothills, with manufacturing expansion in the Coastal Plain between the Los Angeles business district and the harbor. The high density of population which is anticipated as an ultimate condition necessarily means that a comparatively large percentage of the area will be devoted to paved highways, sidewalks, garages, houses, and other types of

impervious surface covering. It is estimated that, for areas occupied by single-family dwellings on regular building lots, 23 percent of the land is rendered impervious by the structure put upon it. This percentage is increased by paved streets to about 30 per cent. Apartment house areas are estimated at about 53 per cent impervious, while manufacturing and commercial districts may reach 95 per cent impervious. This process is rapidly converting area normally absorbent into impervious, flood-producing area."

Respondents have never contended that even the owner of the bed of a natural watercourse can completely block such a watercourse with its structures. The effect of the decision of the District Court of Appeal, however, is to permit the attainment of this result, indirectly, by allowing such an owner to make the enlargement of a natural watercourse, by the public, to accommodate the increase in the water from development such as that described in our last quotation, financially impossible by the construction of structures or facilities of such a nature and magnitude that their relocation would be prohibitively expensive. We are told that there are six hundred miles of natural watercourses in the petitioner District alone. Similar flood control problems exist throughout the rest of Southern California, and, with increasing population, flood control and drainage is a problem not only to the whole State, but to the entire country.

In *Chicago, Burlington & Quincy Railway Company v. People of the State of Illinois*, 200 U. S. 561, on a parallel set of facts to those in this case, the railroad contended (as, apparently, respondents, so far, have successfully contended in this case) that it could erect and maintain any structures it pleased on its own right of way

over a natural watercourse, even though such structures would make necessary improvements to the natural watercourse impossible. In rejecting this contention, this Court, speaking through Mr. Justice Harlan, said, at page 585:

> "* * * This contention cannot, however, be sustained, except upon the theory that the acquisition by the railway company of a right of way through the lands in question, and the construction on that right of way of a bridge across Rob Roy Creek at the point in question, carried with it a surrender by the state of its power, by appropriate agencies, to provide for such use of that natural watercourse as might subsequently become necessary or proper for the public interests. * * *."

ARGUMENT.

A. A Federal Question Is Presented.

Section 16 of the Los Angeles County Flood Control Act (App. C, p. 23) empowers the Board of Supervisors, its governing body:

> "* * * to require, by appropriate legal proceedings, the owner or owners of any bridge * * * or other structure which shall be intersected, traversed or crossed by any * * * waterway * * * so to construct or alter the same as to offer a minimum of obstruction to the free flow of water through or along any such * * * waterway * * * and whenever necessary in the case of existing structures, to require the removal or alteration thereof for such purpose; provided however, that nothing in this act contained shall be deemed to authorize said district * * * to require the removal, relocation, alteration or destruction of any bridge * * * or other structure unless just compensation therefor first be made, in

the manner and to the extent required by the Constitution of the United States and the Constitution of California."

In *Los Angeles County Flood Control District v. Southern California Edison Company*, 51 Cal. 2d 331 at 337, 333 P. 2d 1 at 4, the Court said that that portion of Section 16 above quoted:

> "* * * constitutes legislative recognition that the District is not obligated to pay for utility relocations unless constitutional provisions so require."

We must, therefore, construe the following statement of the District Court of Appeal (App. A, p. 9, 169 A. C. A at p. 888, 338 P. 2d at p. 33) in the light of this decision, announced four months earlier:

> "We are satisfied that there is no 'natural easement' across private property along a ditch or drainway in favor of a Flood Control District or other governmental agency for the purpose of constructing public works."

The conclusion from that premise could not be, in the light of Section 16 as construed by the *Edison* case, *supra*, that, therefore, the District, as a matter of local state law could not compel relocation. Section 16 specifically authorizes it to do so. On the contrary the conclusion necessarily reached by the District Court of Appeal was that constitutional provisions required that the District reimburse respondents.

The respondents have recognized that the essential question in this case is whether requiring them to relocate their pipeline without reimbursement, is a taking of property without due process of law, contrary to the Four-

teenth Amendment of the United States Constitution, when they contended that it was, in their complaint [R. Clk. Tr. p. 5, lines 26-28], at pages 4, 25, and 31 of their Respondent's Brief, and at page 12 of their Answer to Petition for Hearing.

We agree that this Federal question is involved, although we disagree with the answer given by the District Court of Appeal.

In *Chicago, Burlington & Quincy Railway Company v. People of the State of Illinois, supra,* 200 U. S. 561, this Court held that facts strikingly parallel to those in this case, did present a federal question under the Fourteenth Amendment. In that case, this Court affirmed the judgment of the Supreme Court of Illinois, 212 Ill. 103, 72 N. E. 219, which, in turn, affirmed the judgment of the Circuit Court which granted a writ of mandamus compelling the railroad to remove its bridge, which bridge prevented the deepening of a natural watercourse. Further facts appear beginning at page 219 of 72 N. E.:

> "Appellees are organized under the farm drainage act, and have adopted the bed of Rob Roy creek as the main drain for the lands of the district. The district includes about 2,000 acres of land, the majority of which is swamp and slough land, which lands owing to overflow and the continuous presence of water, have up to the time of the organization of the district, been unfitted for cultivation. Rob Roy Creek runs in a southeasterly course through the district and across appellant's railroad, a portion of the district lying upon each side of the railroad. The creek is a natural waterway and has been * * * a natural water course for more than 50 years, and is the natural and only outlet for the land included in the

drainage district * * *. More than 40 years ago appellant constructed a bridge or culvert across Rob Roy Creek of the length of 12 feet and of the width of 30 feet * * *. [I]n the construction of said bridge appellant sank and placed in Rob Roy creek huge wooden timbers and stone, which it has ever since kept and maintained there, thereby preventing the deepening of said creek by petitioner as aforesaid, except by the removal of said timbers and stone * * *."

The Supreme Court of Illinois affirmed the judgment of the Circuit Court, which compelled the railroad to remove its bridge at its own expense, saying, at page 221 of 72 N. E.:

"The right of drainage through a natural water course or a natural drainway is a natural easement appurtenant to the land of every individual through whose land such natural watercourse runs, and every owner of land along such water course is obliged to take notice of the natural easement possessed by other owners along the same water course. * * *."

At page 222, the Court continued:

"A natural water course, being a natural easement, is placed upon the same ground, in many respects, as to the public right, as is a public highway. At the common law if a railroad or another highway crosses a natural watercourse or a public highway, such highway or railroad must be so constructed across the existing highway or waterway, and so maintained, that said highway or waterway, as the case may be, shall not only subserve the demands of the public as they exist at the time of crossing the same, but for all future time. * * *."

The Railroad sought a writ of error in this Court. The District contended that the judgment could be sustained on adequate non-federal grounds, that is, that as a question of purely state law, the railroad's right-of-way was subject to the easement of the public for drainage by this natural watercourse, but this Court said, speaking through Mr. Justice Harlan, 200 U. S. 561 at 580, 581.:

> "The contention is that as the state court based its judgment on the common-law duty of the railway company, and not expressly on any Federal ground, it cannot be said that there was any *denial* of the Federal right claimed by the company * * *.
>
> "Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up and claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the proposed action of the drainage commissioners would deprive it of property without due process of law, then a judgment should have been rendered for the

company. And that result could not be avoided merely by silence on the Federal question, and by placing the judgment on some principle of the common law. * * * The claim of a federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company; for the supreme law of the land must always control. Therefore a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. * * *."

On the point that a federal question was involved this case has been cited and followed with approval by *Fox River Paper Company v. Railroad Commission*, 274 U. S. 651 at 654; *St. Louis, Iron Mountain & Southern Railway Company v. Starbird*, 243 U. S. 592 at 600; *Ferris v. Frohmann*, 223 U. S. 424 at 431; and *West Chicago Street Railway Company v. People ex rel. City of Chicago*, 201 U. S. 506 at 519.

In the *Chicago, B. & Q.* case, *supra*, the federal question presented was whether the common law property right (*i.e.*, natural easement for drainage) as defined by the State Court, impinged on the rights of the railroad guaranteed by the Fourteenth Amendment. In our case

the same federal question is involved, *i.e.*, whether the right to compel relocation created by Section 16 of the Los Angeles County Flood Control Act, *supra*, as exercised in the case at bar, impinged on the rights of the respondents guaranteed by the Fourteenth Amendment. It is clear that had the District Court of Appeal decided that the exercise of this power to compel relocation did not infringe the constitutional rights of respondents, they could have obtained a review by this Court.

That the District Court of Appeal recognized this federal question (App. A, p. 7, 169 A. C. A. at 889, 338 P. 2d 33) is shown by its quotation from *Bauer v. County of Ventura*, 45 Cal. 2d 276 at 282, 289 P. 2d 1 at 5:

> " 'California Constitution, Article I, section 14, provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. . . ." The taking of private property by the state for a public use is universally recognized as one of the indisputable attributes of sovereignty . . . But the state must, except under special circumstances not here present, follow the constitutional procedure which requires the payment of compensation before the private owner is dispossessed of his property. When this requirement is not fully satisfied, an action will lie against the state to recover the value of the property so taken. . . .
>
> " 'Section 14, however, is designed not to create new causes of action but only to give the private property owner a remedy he would not otherwise have against the state for the unlawful dispossession,

> destruction or damage to his property. The state is therefore not liable under this provision for property damage that is *damnum absque injuria*. If the property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14 . . .'"

The second of the quoted paragraphs is consistent with the construction of Section 14, as stated in *San Gabriel Valley Country Club v. County of Los Angeles*, 182 Cal. 392 at 406, 188 Pac. 554 at 559, 560, 9 A. L. R. 1200 at 1210:

> "It is apparently contended on behalf of the plaintiff that even if the injury be *damnum absque injuria* as between private parties, yet when the injury is inflicted by an improvement made by public authority, it must be compensated for under the provision of our constitution (Art. I, sec. 14) that private property shall not be taken or damaged for a public use without just compensation. But the contrary has been directly decided since the filing of the original briefs in this case in *Gray v. Reclamation District*, 174 Cal. 622, [163 Pac. 1024]."

Clearly, therefore, the District Court of Appeal necessarily held that independently of any requirement of Section 14 of Article I of the State Constitution the petitioner, unless it reimbursed the respondents, would be taking private property without due process of law.

B. The Judgment Cannot Be Justified on Any Adequate Non-Federal Grounds.

1. Introductory.

In its complaint respondents' allege:

> "* * * that the taking, damaging and appropriation of plaintiffs' said property without payment of just compensation therefor, including the cost of removal or relocation thereof, was and is without due process of law and in violation of rights vested in plaintiffs [respondents] by the Fourteenth Amendment to the Constitution of the United States, and by the Constitution and laws of the State of California and particularly by Sections 2.6 and 16 of the Los Angeles County Flood Control District Act, as amended." [R. Clk. Tr. p. 5, lines 23-31.]

Respondents may contend, therefore, that the District Court of Appeal placed its decision that the petitioner was taking respondents' property without due process of law upon a non-federal ground, either that such taking violated Section 13 of Article I of the State Constitution, or that it violated some provision of the Los Angeles County Flood Control Act. We consider Section 13 of Article I of the State Constitution, first.

2. The District Court of Appeal Could Not Have Placed Its Decision Solely Upon Section 13, Article I of the State Constitution.

Section 13 of Article I of the Constitution of the State of California (App. C, p. 13) provides, in part:

> "* * * No person shall * * * be deprived of life, liberty, or property without due process of law; * * *."

These words have been held by the California Courts to mean the same thing, exactly, as the same words found in the Fourteenth Amendment of the Constitution of the United States. (*Gray v. Hall*, 203 Cal. 306 at 318, 265 Pac. 246 at 252; *Manford v. Singh*, 40 Cal. App. 700 at 701, 181 Pac. 844.) In the latter case the court said that:

> "* * * said provision of the state constitution prescribes nothing that is not comprehended by said section of the federal constitution. * * *. And said section 13 is manifestly in scope and purpose identical with the said provision of the federal constitution. * * *."

Neither in their briefs nor pleadings do the respondents cite this section of the State Constitution. If, nevertheless, it should be assumed that the District Court of Appeal held that there was a taking of property by petitioner in violation of this section, the District Court of Appeal, must, necessarily, have also held that such taking was, likewise a violation, of Section 1 of the Fourteenth Amendment of the United States Constitution, since both prohibitions are identical.

Since the prohibitions are identical, Section 13 of Article I means the same thing as if it said:

> "Nor shall the State violate any provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

In *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, the appellee contended that the only question at issue was construction of a California Statute, saying, at page 3 of its statement opposing jurisdiction:

> "The act by its own terms excludes from the measure of the tax the receipts of sales which the

State is prohibited from taxing by the Constitution or laws of the United States. In 1937, when the sale in question was made, the applicable portion of the statute read as follows:

"'There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the following:

"'(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America and the Constitution of this state.'

"(Retail Sales Tax Act Sec. 5; Stats. 1933, p. 2601.)

"* * * A tax statute cannot be contrary to the Constitution when it specifically exempts from the measure of the tax those receipts from sales which the State is forbidden to tax by the Constitution. In this case the legislative mandate is clear. If the appellee exacted a tax from appellant in violation of its constitutional rights, it did so without legislative authorization or sanction."

This Court, however, accepted jurisdiction, thus, impliedly rejecting the appellee's contention.

So, here, it cannot be said that the District Court of Appeal was deciding a matter only under the State Constitution, when the portion upon which it is assumed it may have relied, merely copies a portion of Section 1 of the Fourteenth Amendment of the United States Constitution and means exactly the same thing.

In the absence of any express statement to the contrary, we must assume that the District Court of Appeal did not intend to hold contrary to *Gray v. Hall, supra,* 203 Cal. 306 at 318, 265 Pac. 246 at 252; or *Manford v. Singh, supra,* 40 Cal. App. 700 at 701, 181 Pac. 844. A refusal to follow these cases would not present an adequate non-federal ground. *National Association for the Advancement of Colored People v. State of Alabama,* 357 U. S. 449 at 456.

This Court said, in *Morehead v. People of State of New York ex rel. Tipaldo,* 298 U. S. 587 at 603:

> " * * * the Court of Appeals * * * held the act repugnant to the due process clauses of the *State* and Federal Constitutions. 270 N. Y. 233, 200 N. E. 799. The remittitur * * * certified that the federal constitutional question was presented and necessarily passed on. The supreme court entered judgment as directed. We granted a writ of certiorari." (Italics added.)

3. A Non-Federal Ground Cannot Be Found in the Provisions of the Los Angeles County Flood Control Act.

As noted in the Introduction, *supra,* page 19, the respondents contended that the alleged taking of their property was "* * * in violation of rights vested in plaintiffs [respondents] * * * by Sections 2.6 and 16 of the Los Angeles County Flood Control Act, as amended." [R. Clk. Tr. p. 5, lines 26-31.]

There is no Section 2.6. Respondents may refer to paragraph 6 of Section 2 of the Act, printed at page 16 of Appendix C which gives the District the power of eminent domain.

As to Section 16, at page 30 of their Respondents' Brief (part of the record), respondents say that the power of the petitioner District to perform all acts necessary or proper to accomplish the purpose of this act:

> "* * * does not authorize the District to take or damage private property without just compensation; in fact, the 1953 amendment to the act spelled out its obligations in this regard.
>
> "'* * * provided, however, that nothing in this act contained shall be deemed to authorize said District in exercising any of its powers to take, damage or destroy any property or to require the removal, relocation, or destruction of any bridge, railroad, wire line, pipeline, facility or other structure unless just compensation, therefor, be first made, in the manner and to the extent required by the Constitution of the United States and the Constitution of California.'"

This was written prior to, but the decision of the District Court of Appeal was subsequent to, the interpretation of this langauge by the Supreme Court of the State of California in *Los Angeles County Flood Control District v. Southern California Edison Company*, *supra*, 51 Cal. 2d 331 at 336, 337, 333 P. 2d 1 at 4. After quoting that portion of Section 16 of the Act quoted by respondents *supra* the Court said:

> "* * * This provision cannot reasonably be interpreted, as Edison contends, to mean that compensation is to be made in the manner and to the extent that would be required if the constitutional provisions required compensation. It clearly provides for compensation only as 'required' by those provisions. * * * It is true that if the amendment does no more than

> require compliance with the state and federal Constitution, its enactment was unnecessary * * *. Nevertheless, the fact remains that the plain language of the 1953 amendment provides for payment only to the 'extent required' by the constitutional provisions, and if it is anything more than an admonition to obey the constitutions, it constitutes legislative recognition that the District is not obligated to pay for utility relocations unless constitutional provisions so require."

The quoted provisions of Section 16, therefore, are analogous with the provisions of Section 5 of the former California Retail Sales Tax Act, considered by this Court in *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, discussed *supra*, pages 20, 21.

The *Edison* case was cited at pages 16 and 17 of petitioner's reply brief (*sub nomine*, *Los Angeles County Flood Control District v. General Petroleum Corporation*) and at pages 4 and 9 of Petitioner's petition for rehearing. It cannot, therefore, be assumed that the District Court of Appeal ignored or disregarded this most recent decision of the State Supreme Court, *National Association for the Advancement of Colored People v. State of Alabama*, *supra*, 357 U. S. 449 at 456, but it must be presumed that it followed it and recognized that:

> "* * * the District is not obligated to pay for utility relocations unless constitutional provisions so require."

We already have shown, at pages 19 *et seq.*, *supra*, that in holding that constitutional provisions do require the petitioner to pay, the District Court of Appeal necessarily held that Section 1 of the Fourteenth Amendment of the United States Constitution so requires.

C. The Judgment of the District Court of Appeal Is Contrary to a Decision of This Court.

Subparagraph (a) of paragraph (1) of Rule 19 of the Rules of this Court, provides, in part:

> "(a) Where a state court has decided a federal question of substance * * * in a way probably not in accord with applicable decisions of this Court."

The District Court of Appeal has decided a federal question of substance not in accord with the decision of this Court in *Chicago, Burlington & Quincy Railway Company v. People of the State of Illinois, supra,* 200 U. S. 561.

We, already, at page 13, *supra,* have quoted the facts of this case. To avoid repetition we summarize as follows. The railroad in that case was required to remove its bridge which it was maintaining on its private right-of-way across a natural watercourse, since the bridge prevented the deepening of that watercourse by the drainage district. The Supreme Court of Illinois in 212 Ill. 103, 72 N. E. 219 at 221, *supra,* held that since the public had an easement for drainage in a natural watercourse the right of way of the railroad was subject to that prior easement and the railroad must remove its bridge at its own expense. The railroad sought a writ of error to this Court, which affirmed the judgment of the Supreme Court of Illinois, quoting what we have quoted from the opinion of the Supreme Court of Illinois, *supra,* pages 14-16, and holding that the decision of the Supreme Court of Ilinois did not result in the taking of the property of the railroad without due process of law.

The attention of the District Court of Appeal was called to this case at pages 7, 9, 14, 19, 21-26, 29, 32, 43

and 48 of petitioner's opening brief, at pages 6, 20 and 33 of respondents' brief, at pages 8 and 14 of petitioner's reply brief, at pages 1-5, and 9 of petitioner's petition for rehearing, and at pages 1-3 of respondents' answer to that petition.

Respondents contended that this case is not in point because:

1. The Railroad maintained its bridge under franchise and not on its private right-of-way. This Court, however, at page 586 of 200 U. S. clearly stated that the bridge was on the railroad's private right-of-way.

2. The charter limited the rights of the railroad company. This is not so. The Supreme Court of Illinois distinguished *Bailey v. Philadelphia Railroad Company*, 4 Har. 389, 44 Am. Dec. 493, in which the State in granting the railroad's charter specifically granted it the right to maintain a permanent bridge without a draw over a navigable river. All that either the Illinois Court or this Court said was that no such specific grant appeared in the charter of the railroad in that case. This is discussed in greater detail at pages 6-8 of petitioner's reply brief.

Conclusion.

For the foregoing reasons, it is submitted that a writ of certiorari should be granted.

HAROLD W. KENNEDY,
County Counsel,
Attorney for Petitioner.

BALDO M. KRISTOVICH,
Assistant County Counsel,

EDWARD H. GAYLORD,
Deputy County Counsel,
Of Counsel.

APPENDIX A.

Opinion of the District Court of Appeal.

[Civ. No. 23356. Second Dist., Div. One. Apr. 24, 1959.]

Southern California Gas Company (a Corporation) *et al.*, Respondents, v. Los Angeles County Flood Control District, Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County. Clarence M. Hanson, Judge. Affirmed.

Proceeding in inverse condemnation against a flood control district to recover the cost of relocating a gas pipeline. Judgment for plaintiffs affirmed.

Harold W. Kennedy, County Counsel, Baldo M. Kristovich, Assistant County Counsel, Ivar E. Skjeie and Edward H. Gaylord, Deputies County Counsel, for Appellant.

T. J. Reynolds, L. T. Rice, Allen L. Cleveland and C. R. Salter for Respondents.

WHITE, *P. J.*—Southern California Gas Company and Southern Counties Gas Company of California, corporations, hereinafter referred to as the "Gas Companies," brought this action in inverse condemnation against the Los Angeles County Flood Control District, a body corporate and politic, hereinafter referred to as the "District," to recover $6,660.98, the cost of relocating their 30-inch high pressure gas pipe in a 20-year right-of-way easement therefor granted to them by the Pacific Electric Railway, the owner of the fee simple title to the land since 1906. The District appeals from judgment for the Gas Companies.

August 25, 1953, the District entered into an agreement with the county of Los Angeles, in which it is recited that the issuance of its bonds "for the control of surface waters by the construction of storm drains and drainage channels has been authorized," and the county agreed "to proceed with the work of preparing final construction plans and specifications for the construction of those storm drain projects herein described . . .," including East Whittier Storm Drain Project Number 29, out of which the instant action arose, and to complete and deliver to the District said plans and specifications.

A portion of said county engineer's undated specifications describes said Project Number 29 as follows: "The work will extend in an easement, following the natural channel of La Canada Verde Creek, from a point approximately 90 feet southerly of Lambert Road to Second Street."

The District's specifications, its contract for construction, and the contractor's faithful performance bond refer to the project as "Construction of Storm Drain."

In 1954, the District advised the Gas Companies that the District planned to widen and deepen the ditch known as "East Whittier Storm Drain Project No. 29," and requested that their pipeline be relocated at their own expense "under the terms of its permit or franchise." The Gas Companies advised the District that the pipeline was within their own private easement. Then the District, by letter dated March 11, 1955, advised the Gas Companies that, although their pipeline is situated in a private easement, "it crosses a natural drain along which this project will be constructed," and that in the case of "natural drains such as this the public enjoys a natural easement which by its nature would predate any private easement,"

and that consequently the burden of relocating the pipeline was upon the owner of the private easement.

May 24, 1955, pursuant to authorization by the board of supervisors, an agreement for "Easement for Storm Drain" across said land belonging to the Pacific Electric Railway Company was signed and acknowledged by the Railway and the District, "subject to all valid existing contracts, leases, liens, or encumbrances which may affect the property and the word 'grant' as used herein shall not be construed as a covenant against the existence of any thereof." The District, as consideration for said easement, promised to reimburse the Railway for any and all costs and expenses incurred in connection with changes required because of the construction of the said storm drain.

The Gas Companies' "Underground Pipe and Ditch Crossing" agreement with the Railway is dated August 31, 1946, and covers the agreed term of 20 years.

The District and the Gas Companies, under date of May 1, 1955, entered into a *status quo* agreement reciting that "the installation by the District of the Storm Drain . . . will necessarily conflict with an existing 30 inch pipeline . . .," and that a controversy exists between them as to which should bear the cost of relocation of said pipeline. Pursuant to said *status quo* agreement, the Gas Companies relocated their pipeline at a cost to them of $6,660.98.

It appears from the photographic exhibits, maps and drawings of the locale, and was found by the court, that Storm Drain Project Number 29 was designed and constructed to "carry off surface rain water run off from the northern slope of the Puente Hills." It was further found that said Project Number 29 is an artificial im-

provement of a natural watercourse; that, while the stream bed of La Canada Verde Creek is better defined north of Whittier Boulevard than in the vicinity of the Gas Companies' said pipeline, nevertheless, as shown by the United States Geological Survey Maps and other evidence including photographs showing railroad trestles over it and culverts and ditches along its course, the portion of the stream bed being considered on this appeal has long been existent; that although the pipeline of the Gas Companies was well below the ground when installed, the flow of waters in said creek so eroded said channel that before its relocation said pipeline was protruding "above the bed or flow line of La Canada Verde Creek"; and that it was necessary that said pipeline be relocated.

The District's justification of its refusal to pay the costs of the Gas Companies in moving their said pipeline is based primarily upon its claim that every owner of land (or of an easement over land) which is a part of, or immediately adjacent to "a natural watercourse or drainway" owns it subject to "a natural right of the public to utilize such natural facility," to there construct "reasonable artificial improvements for the drainage" of domestic waters and from time to time to deepen and improve such channel for that purpose; and subject to the requirement that any improvements placed by such owner upon said land or easement must from time to time be altered at his own expense as required by public agencies "in aid of the drainage of domestic waters in the drainway"; that the obligation and duty on the part of such owners of land and easements has been enforced as "a part of the retained sovereign or police power of the public exercisable by jurisdictional bodies or agencies, of which appellant is one"; that the public always owned the right to the unrestricted drainway and to enlarge it when and if such

enlargement is needed and all private ownership is subject to that right of the public.

That, if the state, of which appellant is the agent in the instant action, ever owned such an easement, it could not have been lost either by nonuser or by the agreement with the Railway for the "Easement for Storm Drain" hereinbefore described.

Therefore, the first issue to be considered on the instant appeal is the nature of appellant District's rights in the land belonging to Pacific Electric Railway Company and the easement granted by said Railway to the Gas Companies. Is such right, as stated in the grant of the "Easement for Storm Drain," subject to the Railway's prior valid and existing contract with the Gas Companies for "Underground Pipe and Ditch Crossing," or, is it, as urged by appellant, superior even to the rights of all riparian owners—including the Railway?

"Generally speaking, the bed of navigable rivers and streams belongs to the state. . . . If a stream or watercourse is not navigable, the bed is the private property of the riparian owners, and may not be taken for public use without compensation . . ." (25 Cal. Jur. 1046-1048; Freeman v. Bellegarde, 108 Cal. 179, 185 [41 P. 289, 49 Am. St. Rep. 76]; and People v. Elk River M. & L. Co., 107 Cal. 221 224 [40 P. 531, 48 Am. St. Rep. 125].)

Appellant, in its opening brief, cites the following decisions of the California courts as authority for its statement that "the rule is universal that lands located in or along a watercourse are subject to a natural easement or servitude to receive all water naturally arising within the watershed or drainage area served and all of such waters

may be directed into such watercourse by artificial means . . ."

In San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392 [188 P. 554, 9 A. L. R. 1200], judgment for plaintiff for damage caused by the erosion of its property was reversed on appeal. A conduit constructed by the defendant in a natural wash carried water to a point over a mile above plaintiff's property and there returned said water to the wash which crossed plaintiff's land. At page 406, the court said: 'It is apparently contended on behalf of the plaintiff that even if the injury be *damnum absque injuria* as between private parties, yet when the injury is inflicted by an improvement made by public authority, it must be compensated for under the provision of our constitution (Art. I, § 14) that private property shall not be taken or damaged for a public use without just compensation. But the contrary has been directly decided since the filing of the original briefs in this case in Gray v. Reclamation District, 174 Cal. 622 [163 P. [1021] 1041]." .

The San Gabriel case, *supra*, Gray v. Reclamation District, cited therein *supra*, Archer v. City of Los Angeles, 9 Cal. 2d 19 [119 P. 2d 1], and Bauer v. County of Ventura, 45 Cal. 2d 276 [289 P. 2d 1], cited in appellant's opening brief, concern temporary flooding, or probable flooding, of lower lands riparian to a stream in which changes were made or planned by defendants for the purpose of flood prevention. They involve no taking or damaging of private property as part of the actual construction of public works. Not one of said above cited cases lends credence to appellant's claim that the Flood Control District has a "natural easement" along every natural drainway or ditch, which may be deepened, widened, cemented, covered, opened or changed at will, regardless of

and without payment for damage to or destruction of any prior improvements over, across or near said drainway or ditch.

In the instant action, plaintiffs' 30-inch high pressure gas pipe had been installed in their own private easement below the bed of the natural drainway. Appellant District, for the improvement of said drainway, required plaintiffs to, and they did, permit defendant to build a cement conduit across the easement of respondent Gas Companies, wider and deeper than said drainway had been. In connection with the construction of said conduit, said gas pipe was necessarily removed from its then position beneath the bed of said drainway and reconstructed across the top of said cement conduit and beneath the surface of the ground. Said relocation was done pursuant to defendant's demands in connection with its construction of said "East Whittier Storm Drain Project No. 29."

In the Bauer case, *supra*, where plaintiff sought to recover damages to her riparian property caused by defendant's changing of the height of its ditch on property above that of plaintiff, judgment of dismissal was reversed with directions. At page 282, the court said: "California Constitution, article I, section 14, provides: 'Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court, for, the owner . . .

"The taking of private property by the state for a public use is universally recognized as one of the indisputable attributes of sovereignty . . . But the state must, except under special circumstances not here present, follow the constitutional procedure which requires the payment of compensation before the private owner is dispossessed of his property. When this requirement is not

fully satisfied, an action will lie against the state to recover the value of the property so taken . . .

"Section 14, however, is designed not to create new causes of action but only to give the private property owner a remedy he would not otherwise have against the state for the unlawful dispossession, destruction or damage of his property. The state is therefore not liable under this provision for property damage that is *damnum absque injuria*. If the property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14 . . .

". . . Hence it is clear that the ordinary taking of private property for the purpose of constructing storm drainage systems is a taking for a public use. The reasons for such a taking are obviously to provide adequate normal drainage, to control flood waters and to provide irrigation waters. The public becomes principally entitled to the use and enjoyment of the private property taken for such purposes." (P. 284.)

". . . It follows that the taking or damaging of private property for the maintenance of an existing public improvement involving a deliberate act which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole constitutes a taking or damaging of property for a public use and the owner of such property is entitled to compensation.

". . . Had the bank been raised during the original construction it would have been part of the over-all project and hence within the rule of Clement v. State Reclamation Board, *supra*, 35 Cal. 2d 628, and House v. Los Angeles County Flood Control Dist., *supra*, 25 Cal. 2d 384 . . ." (P. 285.)

The House and Clement cases, cited in the portion of the Bauer decision last above quoted, are both based upon the premise that "The construction of the public improvement is a deliberate action of the state or its agency in furtherance of public purposes. If private property is damaged thereby, the state or its agency must compensate the owner therefor . . ." (Clement v. State Reclamation Board, 35 Cal. 2d 628, 641 [220 P. 2d 897].)

We are satisfied that there is no "natural easement" across private property along a ditch or drainway in favor of a Flood Control District or other governmental agency for the purpose of constructing public works.

The Gas Companies having been required by appellant District to move and reconstruct their pipeline in and along their own private easement across said drainway, appellant District and not the Gas Companies should pay the cost of such removal. Appellant District, under the act by which it was created, has the power to require obedience to its demands in its exercise of its right of eminent domain. That power, however, does not relieve said District of its obligation to pay for all property taken or damages caused by its construction of public works.

None of the facts appearing in the record in the instant action require or warrant any exercise by the District of the police power of the state.

Having determined that appellant was not the owner of its claimed "natural easement," the rights claimed by it as incidental to such "natural easement" become immaterial.

The judgment is affirmed.

FOURT, *J.*, and LILLIE, *J.*, concurred.

APPENDIX B.

Opinion of the Superior Court.

In the Superior Court of the State of California in and for the County of Los Angeles.

Southern California Gas Company, a corporation, and Southern Counties Gas Company of California, a corporation, Plaintiffs, vs. Los Angeles County Flood Control District, a body Corporate and Politic, Defendant. No. 659-797.

MEMORANDUM RULING.

This case presents a question of first impression in this State. The question is whether a public utility may be required by a Flood Control District to remove and relocate at its own cost its underground gas transmission pipe lines along with certain facilities located upon or under land wherein it had acquired an easement from the fee-simple owner. The District did not seek to condemn the property, as it might have done, but on the contrary proceeded on the theory that as the pipe line and its facilities were located within the boundaries of a natural watercourse it could deepen, widen and extend the channel for the benefit of the public, without compensation to the plaintiff utilities. In short and in effect, the District predicates its right on the theory that it is exercising its police power or in any event that it has succeeded to the alleged right of the public to have the watercourse kept open and if necessary enlarged to carry any amount of surface and flood waters channeled by it so as to avoid damage to properties within the district. The contention appears to overlook the fact that even the State or a municipality may not deepen and widen a natural watercourse so as to throw a greater volume

of water on the property of a downstream owner without the payment of due compensation, nor may it widen and deepen the existing drainage ditch without paying compensation to the abutting landowners. A so-called watercourse more accurately described as a drainage ditch which began as a natural route to carry surface and storm waters will quite naturally increase in depth and width as a locality becomes more and more densely populated. But it can hardly be said that the government, through its agencies, may artificially widen and deepen the ditch so as to protect the landowners in a watershed by taking the abutting lands without compensation.

Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413, 415, 416, said: "As long recognized, some values are enjoyed under an implied limitation and must yield to police power. But obviously the implied limitation must have its limits, or the absolute contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act." So in the instant case it would seem that the police power cannot be stretched by the defendant to the point of requiring the plaintiff to remove and re-establish the facilities upon ground which it had procured and leased from the fee title owner many years ago.

It is of course true, as defendant contends, that there is a ditch which carries off water, and that this ditch has been formed over the years because of the natural drainage of surface and storm waters is of course true. But this does not give to defendant District by virtue of the police power the right to use that power so as to

avoid paying compensation. In my view, compensation is due and payable.

For that reason judgment is ordered for the plaintiffs in the amount stipulated as the cost of removal of the structures involved.

Dated August 29, 1957

CLARENCE M. HANSON,

Judge.

APPENDIX C.

Constitutional and Statutory Provisions.

Section 13 of Article I, Constitution of the State of California:

Sec. 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial.

Section 14 of Article I of the Constitution of the State of California.

Sec. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility dis-

trict, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. The taking of pri-

vate property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier.

Section 2 of the Los Angeles County Flood Control Act as amended by Chapter 1251, page 3102. Official California Statutes of 1951.

Sec. 2. The objects and purposes of this act are to provide for the control and conservation of the flood, storm and other waste waters of said district, and to conserve such waters for beneficial and useful purposes by spreading, storing, retaining or causing to percolate into the soil within said district, or to save or conserve in any manner, all or any of such waters, and to protect from damage from such flood or storm waters, the harbors, waterways, public highways and property in said district.

Said Los Angeles County Flood Control District is hereby declared to be a body corporate and politic, and as such shall have power:

1. To have perpetual succession.

2. To sue and be sued in the name of said district in all actions and proceedings in all courts and tribunals of competent jurisdiction.

3. To adopt a seal and alter it at pleasure.

4. To take by grant, purchase, gift, devise or lease, hold, use, enjoy, and to lease or dispose of real or personal property of every kind within or without the district necessary to the full exercise of its power.

5. To acquire or contract to acquire lands, rights of way, easements, privileges and property of every kind, and construct, maintain and operate any and all works or improvements within or without the district necessary or proper to carry out any of the objects or purposes of this act, and to complete, extend, add to, repair or otherwise improve any works or improvements acquired by it as herein authorized.

6. To have and exercise the right of eminent domain, and in the manner provided by law for the condemnation of private property for public use, to take any property necessary to carry out any of the objects or purposes of this act, whether such property be already devoted to the same use by any district or other public corporation or agency or otherwise, and may condemn any existing works or improvements in said district now used to control flood or storm waters, or to conserve such flood or storm waters or to protect any property in said district from damage from such flood or storm waters.

7. To incur indebtedness, and to issue bonds in the manner herein provided.

7a. In addition to the powers given in the next preceding subsection, to borrow money from the United States of America, any agency or department thereof, or from any nonprofit corporation, organized under the laws of this State, to which the Reconstruction Finance Corporation, a corporation organized and existing under and by virtue of an act of Congress, entitled "Reconstruction Finance Corporation Act," or other agency, or department, of the United States Government, has authorized, or shall hereafter authorize, a loan to enable such nonprofit corporation to lend money to said Los Angeles County Flood Control District, for any flood control work authorized

under this act, and to repay the same in annual installment, over a period of not to exceed twenty (20) years, with interest at a rate of not to exceed four and one-fourth per centum (4¼%) per annum, payable semi-annually, and, without the necessity of an election when authorized by resolution of the board of supervisors, as evidences of such indebtedness, said district is hereby authorized to execute and deliver a note, or a series of notes, or bonds, or other evidences of indebtedness, signed by the chairman of the board of supervisors of said district, which notes, bonds, or other evidences of indebtedness, shall be negotiable instruments if so declared in said resolution of the board of supervisors providing for their issuance, and said notes, bonds, or other evidences of indebtedness, may have interest coupons attached to evidence interest payments, signed by the facsimile signature of said chairman of said board. All applications for such loans shall specify the particular flood control work or projects for which the funds will be expended, and when received, the money shall be deposited in a special fund, and shall be expended for those purposes only which are described and referred to in the applications. If a surplus remains after the completion of said work, such surplus shall be applied to the payment of the note, notes, bonds, or other evidences of indebtedness, executed as aforesaid, for the loan including interest coupons. The board of supervisors shall annually, levy a tax upon the taxable real property of said district, clearly sufficient to pay the interest and installments of principal, as the same shall become due and payable, under any loan made pursuant to the authority of this section, and to create and maintain a reserve fund to assure the prompt payment thereof, as may be provided by said resolution of the board of supervisors; provided, however, that the amount

of taxes levied in any year, pursuant to the provisions of this subsection, shall, *pro tanto*, reduce the authority of the board of supervisors, during any such year, to levy taxes under Section 14 of this act, but this proviso shall not be a limitation upon the power and duty to levy and collect taxes under this subsection.

Notwithstanding anything in this subsection 7a to the contrary, the total amount which said district may borrow under the authority of any or all of the provisions of this subsection is limited to and shall not exceed in the aggregate the sum of four million five hundred thousands dollars ($4,500,000).

7b. The power granted in the next preceding subsection is hereby extended to authorize the issuance and sale of bonds or other evidences of indebtedness of said district to the County of Los Angeles and the purchase thereof by said county in accordance with "An act authorizing the investment and reinvestment and disposition of any surplus moneys in the treasury of any county, city and county, incorporated city or town or municipal utility district or flood control district," approved April 3, 1913, as amended; all subject to the provisions and limitations of the next preceding subsection relative to the disposition and use of funds, interest rate, period of payment, tax rate and mode of issuance. The total amount of bonds or other evidence of indebtedness, in the aggregate, which the district may issue and sell under the authority of subsection 7a and of this subsection is limited to and shall not exceed four million five hundred thousand dollars ($4,500,000).

8. To cause taxes to be levied and collected for the purpose of paying any obligation of the district in the manner hereinafter provided.

9. To make contracts, and to employ for temporary services only, expert appraisers, consultants and technical advisers, and to do all acts necessary for the full exercise of all powers vested in said district, or any of the officers thereof, by this act.

10. To grant or otherwise convey to counties, cities and counties, cities or towns easements for street and highway purposes, over, along, upon, in, through, across or under any real property owned by said Los Angeles County Flood Control District.

11. To remove, carry away and dispose of any rubbish, trash, debris or other inconvenient matter that may be dislodged, transported, conveyed or carried by means of, through, in, or along the works and structures operated or maintained hereunder and deposited upon the property of said district or elsewhere.

12. To pay premiums on bonds of contractors required under any contract wherein the amount payable to the contractor exceeds five million dollars ($5,000,000); provided, that the specifications in such cases shall specifically so provide and state that the bidder shall not include in his bids the cost of furnishing the required bonds.

13. To lease, sell or dispose of any property (or any interest therein) whenever in the judgment of said board of supervisors said property, or any interest therein or part thereof, is no longer required for the purposes of said district, or may be leased for any purpose without interfering with the use of the same for the purpose of said district, and to pay any compensation received therefor into the general fund of said district and use the same for the purposes of this act; provided, however, that nothing herein shall authorize the board of supervisors or other governing body of the district or any officer thereof

to sell, lease or otherwise dispose of any water, water right, reservoir space or storage capacity or any interest or space therein except to public agencies for recreational purposes when such use is not inconsistent with the use thereof by the district for flood control and water conservation purposes; or except as hereinafter provided by Section 17 of this act; provided, however, that said district may grant and convey to the United States of America, or to any federal agency authorized to accept and pay for such land or interests in land, all lands and interests in land, now owned or hereafter acquired, lying within any channel, dam or reservoir site, improved or constructed, in whole or in part, with federal funds, upon payment to the district of sums equivalent to actual expenditures made by it in acquiring the lands and interests in land so conveyed and deemed reasonable by the Secretary of War and the Chief of Engineers.

The said district by or through its board of supervisors or other board or officers at any time succeeding to the duties or functions of its board of supervisors, is hereby authorized and empowered to warrant and defend the title to all land and interests therein so conveyed to the United States of America or to any such agency and their respective assigns; to covenant and agree to indemnify and keep indemnified and to hold and save harmless and exonerated the United States of America or any such agency, to which such lands or any interest therein are so conveyed by said district, from and against all demands, claims, liabilities, liens, actions, suits, charges, costs, loss, damages, expenses and attorneys' fees of whatsoever kind or nature, resulting from, arising out of or occasioned by any defect or defects whatsoever in the title to any such land or interest in land so conveyed by said district; to reimburse and save harmless and exonerated the United States

of America or any such agency for any and all amounts, paid, and expenses incurred, in the compromise or settlement of any demands, claims, liabilities, liens, actions, suits, charges, costs, loss, damages, expenses and attorneys' fees of whatsoever kind or nature, resulting from, arising out of or occasioned by any claim to or defect or defects whatsoever in the title to any such land or interests in land so conveyed by said district; to pay all just compensation, costs and expenses, which may be incurred in any condemnation proceeding deemed necessary by the United States of America or such agency, in order to perfect title to any such land or interest in land, including without limitation all attorneys' fees, court costs and fees, costs of abstracts and other evidences of title, and all other costs, expenses or damages incurred or suffered by the United States of America or such agency, and consent is hereby given to the bringing of suit or other legal proceedings against said district by the United States of America or such agency, as the case may be, in the proper district court of the United States, upon any cause of action arising out of any conveyance, contract or covenant made or entered into by said district pursuant to the authority granted in this act, or to enforce any claims, damages, loss or expenses arising out of or resulting from any defect whatsoever in the title to such land or any interest therein or any claims of others in or to such land or interest therein. (Stats. 1951, Chap. 1271).

Section 16. Los Angeles County Flood Control Act as amended by Chapter 1139, page 2635, Official California Statutes of 1953.

Sec. 16. The said board of supervisors of said district shall have power to make and enforce all needful rules

and regulations for the administration and government of said district, and to perform all other acts necessary or proper to accomplish the purposes of this act.

Said board of supervisors shall have power to do all work and to construct and acquire all improvements necessary or useful for carrying out any of the purposes of this act; and said board of supervisors shall have power to acquire either within or without the boundaries of said district, by purchase, condemnation, donation or by other lawful means in the name of said district, from private persons, corporations, reclamation districts, swamp land districts, levee districts, protection districts, drainage districts, irrigation districts, or other public corporations or agencies or districts, all lands, rights of way, easements, property or materials necessary or useful for carrying out any of the purposes of this act; to make contracts to indemnify or compensate any owner of land or other property for any injury or damage necessarily caused by the exercise of the powers conferred by this act, or arising out of the use, taking or damage of any property, rights of way or easements, for any of such purposes; to compensate any reclamation district, protection district, drainage district, irrigation district or other district, public corporation or agency or district, for any right of way, easement or property taken over or acquired by said Los Angeles County Flood Control District as a part of its work of flood control or conservation or protection provided for in this act; and any such reclamation district, protection district, drainage district, irrigation district or other district or public corporation or agency is hereby given power and authority to distribute such compensation in any manner that may be now or hereafter allowed by law; to maintain actions to restrain the doing of any act or thing that may be injurious to carrying out any of the purposes

of this act by said district, or that may interfere with the successful execution of said work, or for damages for injury thereto; to do any and all things necessary or incident to the powers hereby granted, or to carry out any of the objects and purposes of this act; to require, by appropriate legal proceedings, the owner or owners of any bridge, trestle, wire line, viaduct, embankment or other structure which shall be intersected, traversed or crossed by any channel, ditch, bed of any stream, waterways, conduit or canal, so to construct or alter the same as to offer a minimum of obstruction to the free flow of water through or along any such channel, ditch, bed or any stream, waterway, conduit or canal, and whenever necessary in the case of existing works or structures, to require the removal or alteration thereof for such purpose; provided, however, that nothing in this act contained shall be deemed to authorize said district in exercising any of its powers to take, damage or destroy any property or to require the removal, relocation, alteration or destruction of any bridge, railroad, wire line, pipeline, facility or other structure unless just compensation therefor be first made, in the manner and to the extent required by the Constitution of the United States and the Constitution of California.

In case of condemnation proceedings, the said board of supervisors shall proceed in the name of said district, under the provisions of Title 7, Part 3, of the Code of Civil Procedure of the State of California, which such provisions are hereby made applicable for that purpose, and it is hereby declared that the use of the property, lands, rights of way, easements, or materials which may be condemned, taken or appropriated under the provisions of this act is a public use subject to the regulation and control of the State in the manner prescribed by law, and said board of supervisors of said district is hereby

vested with full power to do all other acts or things necessary or useful for the promotion of the work of the control of the flood and stream waters of said district, and to conserve such waters for beneficial and useful purposes, and to protect from damage from such storm or flood waters the harbors, waterways, public highways and property in said district; provided, however, that nothing in this act contained shall be deemed to authorize said district, or any person or persons, to divert the waters of any river, creek, stream, irrigation system, canal or ditch, from its channel, to the detriment of any person or persons having any interest in such river, creek, stream, irrigation system, canal or ditch, or the waters thereof or therein, unless previous compensation be first ascertained and paid therefor, under the laws of this State authorizing the taking of private property for public uses; and provided further, that nothing in this act contained shall be construed as in any way affecting the plenary power of any incorporated city, city and county, or town, or municipal or county water district, to provide for a water supply of such public corporation, or as affecting the absolute control of any properties of such public corporations necessary for such water supply, and nothing herein contained shall be construed as vesting any power of control over such properties in said Los Angeles County Flood Control District, or in any officer thereof, or in any person referred to in this act; and provided further, that nothing in this act contained shall be deemed to authorize said board of supervisors to raise money for said district by any method or system other than that by the issuing of bonds, or the levying of a tax upon the assessed value of all the real property in said district in the manner in this act provided, except from the sale and lease of its property as herein provided.

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IN THE

Supreme Court of the United States

October Term, 1950.

No. 301.

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1959.

No. 281

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Respondents, Southern California Gas Company and Southern Counties Gas Company of California respectfully request this Honorable Court to deny the petition of Los Angeles County Flood Control District for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One, to review its judgment, Civ. No. 23356, April 24, 1959, which affirmed the decision of the Superior Court in *Southern California Gas Company, et al. v. Los Angeles County Flood Control District*, Los Angeles Superior Court Case No. 659-797.

Opinions Below.

The memorandum of opinion of the Superior Court which granted judgment to the respondents is unreported, but is printed as Appendix A of this brief. The opinion of the District Court of Appeal which affirmed unanimously the judgment of the Superior Court has not yet been published, but will be reported in 169 California Appellate Reports 2nd, and is now reported in 69 Advance California Appellate Reports, page 881, etc. and 338 Pacific 2nd, page 29, etc., and is printed as Appendix B of this brief.

The Flood Control District petitioned the District Court for a rehearing, but the petition was denied on May 20, 1959. The Flood Control District then petitioned the Supreme Court of the State of California for a hearing, and that petition was denied on June 18, 1959.

Jurisdiction.

The petitioner has not set forth the jurisdictional requisites necessary to invoke the jurisdiction of this Court. Although certain statutory provisions contained in 28 U. S. Code and Rule 19 of the Rules of this Court were cited in the petition, the petitioner failed to explain the applicability of those provisions to the opinions of the courts below so as to show that a "federal question of substance" was decided. On the contrary, it is clear from these opinions that the state courts' judgments were based on a non-federal ground and that the non-federal ground was adequate to support the judgments therein.

Question Presented.

Whether a public utility can be required to relocate at its own expense an underground pipeline installed within a private easement obtained from the fee simple owner to make way for the widening and deepening of a small drainage ditch by a flood control district.

State Constitutional Provisions Involved.

Section 14 of Article I of the California Constitution.

Statement.

Respondents are the owners of a gas pipeline thirty (30) inches in diameter which was constructed in 1947 in the land owned by Pacific Electric Railway Company, owners of the fee land [Clk. Tr. p. 23], under and across the bed of a so-called natural watercourse in Los Angeles County, California. Pacific Electric Railway Company had granted the right to respondents to construct such line under an agreement dated August 31, 1946 for a period of twenty (20) years and sometimes referred to as "an underground pipe or ditch crossing agreement or lease" [Clk. Tr. pp. 20 and 21]. Petitioner has filed with this Court only one exhibit; but several of the other exhibits referred to in the Clerk's Transcript are photographs showing the natural watercourse to be a dried-up brook. [These are exhibits referred to on p. 31 of Clk. Tr.]

In 1954, the petitioner advised the Gas Companies that it planned to widen and deepen a certain drainage ditch pursuant to "East Whittier Storm Drain Project No. 29,"

and requested the Gas Companies to relocate their pipeline at their own expense "under the terms of its permit or franchise." The Gas Companies advised the petitioner that the pipeline was within their own private easement. Then the petitioner, by letter dated March 11, 1955, advised the Gas Companies that, although the pipeline was situated in a private easement, "it crosses a natural drain along which this project will be constructed," and that in the case of natural drains such as this the public enjoys a natural easement which by its nature would predate any private easement," and that consequently the burden of bearing the cost of relocating the pipeline was upon the owner of the private easement.

On May 24, 1955, an agreement for "Easement for Storm Drain" was executed by the Pacific Electric Railway Company, the owner of the fee, and the petitioner, pursuant to authorization by the Board of Supervisors of the County of Los Angeles, "subject to all valid existing contracts, leases, liens, or encumbrances which may affect the property and the word 'grant' as used herein shall not be construed as a covenant against the existence of any thereof." The petitioner, as consideration for said easement, promised to reimburse the Railway for any and all costs and expenses incurred in connection with changes required because of the construction of the said storm drain.

It should be noted that the pipeline did not interfere with the flow of water in the drainage ditch, but that the proposed enclosed underground storm drain which

lowered the bed of the ditch several feet would have bisected the pipeline.

The petitioner at no time filed any proceedings in condemnation to obtain title to or to take possession of any interest in the land or physical property owned by Pacific Electric Railway Company or of the respondents or other property in or adjacent to the property described in Exhibit 8.

The petitioner and the Gas Companies entered into a *status quo* agreement dated May 1, 1955, which recited that "the installation by the District of the Storm Drain . . . will necessarily conflict with an existing 30-inch pipeline . . .", and that a controversy exists between them as to which should bear the cost of relocation of said pipeline. Pursuant to said *status quo* agreement, the Gas Companies relocated their pipeline at a cost to them of $6,660.98.

A suit was brought in the Superior Court of the County of Los Angeles against the petitioner, for damages on the basis that there was a taking, damaging and appropriation of respondents' property without payment of just compensation. Respondents recovered judgment as prayed for and the judgment was affirmed by the District Court of Appeal.

ARGUMENT.

I.

The Appellant Has Failed to Set Forth Jurisdictional Requisites Necessary to Invoke the Jurisdiction of the United States Supreme Court.

1. General Rule.

The Supreme Court has consistently held that it will not grant certiorari to review a state court's judgment based upon an adequate and independent non-federal ground which made consideration of an asserted federal question unnecessary.

The general rule was laid down by Justice Story in *Crowell v. Randell*, 10 Pet. (U. S.) 368, 9 L. Ed. 458 (1836), wherein he stated that in order to justify the United States Supreme Court in taking jurisdiction to review the decision of a state court it must appear that one of the questions stated in the 25th Section of the Judiciary Act must have arisen, that the question was decided by the state court, that the question by necessity must have been raised and must have been decided to induce judgment and it would not be sufficient to show that the question might have arisen or might have been applicable.

To this general rule has been added that there must be a real and substantial federal question.

New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 35 L. Ed. 943, 12 S. Ct. 142 (1891);

Consolidated Turnp. Co. v. Norfolk & O. V. R. Co., 228 U. S. 596, 5 L. Ed. 982, 33 S. Ct. 605 (1913);

Southwestern Bell Telephone Company v. State of Oklahoma, 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528 (1938).

The reiteration of this rule by the Supreme Court is found throughout its decisions. In *Minnesota v. National Tea Co.*, 309 U. S. 551, 84 L. Ed. 920 (1939) the Court stated on page 557:

> "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."

Chief Justice Hughes in the *National Tea Company* case, *supra,* in the dissenting opinion, stated on Page 558:

> "The decision thus rested upon an adequate non-federal ground and in accordance with long-established doctrine we are without jurisdiction."
>
> "Fox Film Corp. v. Muller, 296 U. S. 207, 210 80 L. Ed. 158, 195, 56 S. Ct. 183."

In *Herb v. Pitcairn,* 324 U. S. 117, 89 L. Ed. 789 (1944), on pages 125 and 126, the Court states:

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

2. No Federal Question Arose.

The petitioner has failed to cite a single federal right that was claimed by it and denied. Nor has the petitioner shown that *any* asserted federal right has suffered or might suffer by reason of the decisions of the courts below. The two reasons on which the petitioner apparently bases its allegation that a federal question arose are (1) the *respondents'* briefs alleged that the taking of a private easement without the payment of just compensation would violate the California Constitution and the Constitution of the United States, and (2) that Section 13 of Article I of the California Constitution (which was not mentioned either in the respondents' briefs or by the courts) was similar in language and meaning to the Fourteenth Amendment of the Constitution of the United States. Both of these reasons beg the question.

It has been held that before the Supreme Court has jurisdiction to re-examine the final judgment of a state court, the averments must be clear and positive so as to place it beyond question *that the party bringing the case up for review* intended to assert a federal right.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. Ed. 1149, 175 S. Ct. 709 (1897);

Levy v. Superior Ct., 167 U. S. 175, 42 L. Ed. 126, 17 S. Ct. 769 (1897);

Kipley v. Illinois, 170 U. S. 182, 42 L. Ed. 998, 18 S. Ct. 550 (1898).

F. G. Oxley Stave Co. v. Butler County, *supra*, quotes *Proprietors of Bridges v. Hoboken Land and Improvement Co.*, 68 U. S. 571, 1 Wall. 116, 140 (17:571), as follows:

". . . the court must be able to see clearly, from the whole record, that a certain provision of the Con-

stitution or act of Congress was relied on *by the party who brings the writ of error*, and that the right thus claimed *by him* was denied." (Emphasis added.)

To the same effect see:

Tyler v. Judges of Court of Registration, 179 U. S. 405, 45 L. Ed. 252, 21 S. Ct. 206 (1900).

Even if the state courts had based their decisions upon a state constitutional provision similar to one in the Constitution of the United States, as asserted by the petitioner, it does not necessarily follow that the state court would be, as a matter of course, basing its decision upon a federal question. In *New York v. Central Savings Bank*, 306 U. S. 661, 83 L. Ed. 1058, 59 S. Ct. 790 (1939), the Supreme Court had been requested to issue a Writ of Certiorari to the Court of Appeals of New York which had decided that a state statute was repugnant to the due process clause of the state constitution, that clause being the same as the due process clause of the Fourteenth Amendment which the court held also had been violated. 280 N. Y. 9, 10, 19 N. E. 2d 659, 121 A. L. R. 615 (1939).

The Supreme Court of the United States in its denial of the writ stated as follows:

"Denied for the reason that the judgment sought to be reviewed rests upon a non-federal ground adequate to support it.

Lynch v. New York 293 U. S. 52, 79 L. Ed. 191, 55 S. Ct. 16

Honeyman v. Hana 300 U. S. 14, 18, 19, 81 L. Ed. 476, 479, 57 S. Ct. 350."

3. A Federal Question Was Not Decided.

Even if it were to be assumed that a federal question did arise in the lower courts, the petitioner has failed to show that the courts passed upon or decided such a question. There is nothing in the record to show that the District Court of Appeal relied on or even made reference to the Constitution of the United States.

It is settled that in order to justify the United States Supreme Court in reviewing the judgment or decree of a state court, the record must show that the judgment rested upon the disposition of a federal question.

Marsh v. Nichols, S. & Co., 140 U. S. 344, 35 L. Ed. 413, 11 S. Ct. 798 (1891).

It is necessary not only that some one of the questions mentioned in the statute should exist on the record but also that the decision thereof should be controlling in the disposition of the cause.

Citizens' Bank v. Board of Liquidation, 98 U. S. 140, 25 L. Ed. 114 (1879).

Jurisdiction cannot be founded upon a mere surmise that the decision of the state court turned upon a federal question.

Lynch v. New York, 293 U. S. 592, 79 L. Ed. 191, 55 S. Ct. 16 (1934);

Adams v. Russell, 229 U. S. 353, 57 L. Ed. 1224, 33 S. Ct. 846 (1913).

It must, therefore, appear from the record, affirmatively or by fair implication, that the decision of the federal question was necessary to the determination of the case.

An analysis of the decisions of the courts below shows clearly that the statutory provisions in 28 United States Code and Rule 19 of the Rules of this Court do not contain grounds under the facts of this case which would confer jurisdiction on the Supreme Court to review the judgment by a Writ of Certiorari. Section 1257, paragraph 3 of 28 United States Code, cited by the appellant, states that final judgments rendered by the highest court of the state may be reviewed "where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution" or "where any title, right, privilege or immunity is specially set up or claimed under the constitution." We submit that the petitioner has not shown that these provisions are in any way applicable to the decisions which it desires be reviewed.

4. Decisions of the State Courts Are Based on Adequate Non-Federal Grounds.

The petition of the Flood Control District ignores the language of the District Court of Appeal which shows that the decision was based upon the California Constitution. The District Court quotes from *Bauer v. County of Ventura*, 45 Cal. 2d 276, 289 P. 2d 1 (1955), at pages 282 and 284, as follows:

> *"California Constitution, article I, section 14, provides*: 'Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court, for, the owner. . . .'
>
> ". . . Hence it is clear that the ordinary taking of private property for the purpose of constructing storm drainage systems is a taking for a public use. The reasons for such a taking are obviously to provide adequate normal drainage, to control flood

waters and to provide irrigation waters. The public becomes principally entitled to the use and enjoyment of the private property taken for such purposes." (p. 284.)

". . . . It follows that the taking or damaging of private property for the maintenance of an existing public improvement involving a deliberate act which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole constitutes a taking or damaging of property for a public use and the owner of such property is entitled to compensation." (Emphasis added.)

In another portion of its decision the District Court sets out the law in California as to non-navigable streams as follows:

"Generally speaking, the bed of navigable rivers and streams belongs to the state. . . . If a stream or watercourse is not navigable, the bed is the private property of the riparian owners, and may not be taken for public use without compensation. . . ." (25 Cal. Jur. 1046-1048; *Freeman v. Bellegarde*, 108 Cal. 179, 185 [41 P. 289, 49 Am. St. Rep. 76]; and *People v. Elk River M. & L. Co.*, 107 Cal. 221, 224 [40 P. 531, 48 Am. St. Rep. 125].)

Even if the lower courts had based their decisions on both federal and non-federal grounds, this Honorable Court has held that if will not inquire into a judgment if there are adequate state grounds.

Fox Film Corp. v. Muller, supra;

Enterprise Irrig. Dist. v. Farmer's Mut. Canal Co., 243 U. S. 157, 163-164, 61 L. Ed. 645 (1917).

In *Minnesota v. National Tea Company, supra,* at page 556, the Court stated:

> "It is possible that the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution."

In *Hammerstein v. Superior Court of California,* 340 U. S. 622, 95 L. Ed. 587 (1950), both federal and non-federal questions were involved. The Supreme Court refused to hear the case until the California Courts expressed an opinion as to, "whether the decision of the federal question was *necessary* to the judgment rendered." The Supreme Court stated on page 623:

> "If their judgments rest upon an adequate state ground, we, of course, will not review those judgments."

II.

The Decisions of the Courts Below Are Clearly Correct.

The decision of the District Court of Appeal makes it clear that it is well settled in California that the taking of a private easement without just compensation is in violation of Section 14, Article I of the California Constitution. There is ample California authority to support this conclusion. The petitioner has failed to cite a single California case to the contrary, but has instead advanced a "natural watercourse" theory in an effort to sustain its position. To the effect that the taking of private property for the construction of a storm drain is a taking for pub-

lic use and that just compensation must be paid to the owner, respondents have cited:

Bauer v. County of Ventura, 45 Cal. 2d 276, (1955);

Podesta v. Linden Irr. Dist., 141 Cal. App. 2d 38, (1956).

Other California cases have specifically held that, where pipeline facilities are located in a private easement and are ordered to be relocated in connection with an improvement by a governmental body, the owner of the facilities must be compensated. In the case of *County of Los Angeles v. Wright* (1951), 107 Cal. App. 2d 235, the defendant was the owner in fee of a pipeline right of way granted to it by the owner of the fee. At a later date a road easement was granted to the County of Los Angeles by the owner of the fee. The County demanded the relocation of the pipeline facilities installed within the easement. The court stated on page 241:

> "An easement over land is real property and the owner of such easement is entitled to recover damages when such easement is taken or damaged for public use. Pacific is therefore entitled to damages in the amount of the cost of removal of its pipe line. . . ."

Decisions in the highest courts of sister states, under factual situations almost identical with the one before the California courts, have held that a drainage district must reimburse a gas company for the relocation of facilities installed within a private easement.

In *Petition of Dreosch et al., Northern Natural Gas Co. v. Blue Earth County*, 47 N. W. 2d 106 (1951), the

Supreme Court of the State of Minnesota was concerned with the following situation. The Northern Natural Gas Company, a private corporation, operated a natural gas pipeline system which delivered gas from Kansas and Texas to several states including Minnesota. Its pipelines were primarily installed in private rights of way purchased from record owners.

County Ditch No. 78 was established for draining 10,000 acres of agricultural land. It followed a natural swale which crossed the pipeline of the gas company in three places. At each of these points the pipeline was installed within private easements and had been placed below the surface of the drainage ditch. The improvement of the ditch involved the enlargement and deepening of a natural watercourse and necessitated either the lowering or raising of the pipeline. It was argued, as it has been in this case, that the improvement was for the promotion of public welfare, that there was a natural right to drain the upper land, that the gas company had knowledge of the watercourse and that there was an injury *damnum absque injuria* because the establishment of a drainage system is in the exercise of police power.

On page 109, the Court quoted from *In re Town Ditch No. 1*, 208 Minn. 566, 571, 295 N. W. 47, 49 (1940):

> ". . . . Their damage, if any, will result from the exercise of power of eminent domain. So it is immaterial that, from the standpoint of public health, the police power justifies the drainage. The property is taken or damaged, not by the police power, but by that of eminent domain. Hence, the right to compensation is absolute."

On page 110 the Court stated as follows:

"An easement is *property* and when taken for public use the owner is ordinarily entitled to compensation."

In *Cities Service Gas Co. v. Riverside Drainage District*, 137 Kan. 410, 20 P. 2d 520 (1933), the gas company owned land through which ran a small natural watercourse and across which the company had installed a gas transmission pipeline. The widening and deepening of the watercourse by the drainage district necessitated the relocation of the pipeline. The Supreme Court of Kansas held that the gas company was entitled to recover for the land appropriated and for the reasonable cost of relocating its pipeline. On pages 521 and 522 the court stated:

"It was a nonnavigable stream, and the plaintiff owned the banks and beds of the creek and the rights to use them subject of course to the rights of riparian owners in the flow of the water.

"The pipe line of the plaintiff was an improvement of a permanent nature, was originally placed twelve inches below the bed of the stream across which it was laid, and it could not be regarded as an obstruction when it was placed there. The plaintiff was as much entitled to damages for the removal and replacement of the pipe line as if it had been a substantial building on the bank of the watercourse which required removal before the widening and deepening process was begun by the drainage district, and it would hardly be contended that the owner of the building in such a case would not be entitled to compensation."

The court rejected the contention that the taking was an exercise of the police power by stating (p. 522):

> "The rule applies in some emergencies, such as the destruction of property to avert impending peril, as to prevent the spread of fire, the washing out of a highway during a freshlet or flood, and the abatement of a nuisance. There are cases too where *franchises* have been granted . . . to place pipes in public streets . . . and which they can be required to move without compensation. . . . *Property cannot be appropriated without compensation under the guise of police power.* . . . In an ordinary case of condemnation and appropriation of the owner's property as in the present case, the constitutional right to compensation cannot be ignored or denied." (Emphasis supplied.)

III.

There Is No Conflict of Decisions.

Petitioner, having been defeated in the California Courts, and being unable to cite any California decision in its favor seeks to secure a hearing before this court on the basis of a federal case. It places its reliance upon the case of *Chicago, Burlington & Quincy Railway Company v. People of the State of Illinois*, 200 U. S. 561, 50 L. Ed. 596, 26 S. Ct. 341 (1906).

The facts of this railroad case, as well as the other railroad cases cited by the petitioner in the courts below, are clearly not analogous to the relocation of a pipeline installed in a private easement under a drainage ditch. In every instance the railroad companies had assumed the duty to relocate by reason of the terms of the franchises, charters or statutory authority under which they

were authorized to operate and none involved the ownership of the fee or a private easement. This is clearly indicated in the *Chicago, B. & Q.* case where the Supreme Court of Illinois, 72 N. E. 219, said at page 222:

> "While its charter is not set out in the petition, and its exact provisions are not before us, the presumption will be that its charter is such as is ordinarily granted to construct and operate a railroad between the points therein mentioned. The allegation of the petition is that appellant was organized 'with corporate power to build, construct, operate and maintain a railroad at and in the township and county aforesaid,' and there is no presumption that it had any greater powers than those set forth in the petition. As said in *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179: 'When a *franchise* is granted to construct ways or streets across a waterway there is no implied right to destroy the waterway, but it must be so bridged that its use will not be unnecessarily impaired." (Emphasis supplied.)

In *Chicago, B. & Q. R. Co. v. Illinois, supra*, the United States Supreme Court in affirming the *Chicago* case, states on page 566:

> "The railway company operated and maintained its road across Rob Roy Creek not under any specific grant of authority, but under its general corporate power to construct, operate and maintain a railroad."

The Supreme Court has also specifically limited the rule in the *Chicago, B. & Q.* case to railroads. In *Panhandle, etc. v. State Highway Commission*, 294 U. S. 614, 55 S. Ct. 563, 79 L. Ed. 1090 (1935), which involved

the relocation of a pipeline installed within a private right of way, the Court on page 622, stated:

> "The rule in respect of railroad crossings applies when there is substantial risk of injury to the public from the operation of trains, and ground to imply the company's consent to take such measures as may be necessary to prevent the hazard. This Court has not sanctioned extension of the rule to wholly dissimilar circumstances; it does not apply to structures which are unattended by serious danger to the public.
>
> The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury.
>
> *New York & N. E. R. Co. v. Bristol,* 151 U. S. 556, 38 L. Ed. 269, 14 S. Ct. 437."

The argument that the *Chicago, B. & Q.* case is applicable in the case before the Court is also irreconcilable with the agreement between the petitioner and the Pacific Electric Railway under which the petitioner agreed to pay all relocation damages sustained by the railroad. If the *Chicago, B. & Q.* case did not furnish a basis for the Flood Control District to compel the railroad to re-

locate at its own expense, how can such a principle be applied against the respondent, who constructed a pipeline within a private easement across the railroad private property.

A further important distinction between the case before this Court and the *Chicago, B. & Q.* case is that the petitioner in the railroad case claimed that *its* private property was being taken without just compensation and that *its* federal right was being violated. No such allegation has been made by the petitioner in this case. At no time has any claim been made that the peittioner's title, rights, privilege or immunity claimed under the constitution have been assailed or violated.

IV.

There Is No Important Question of Federal Law.

The question as to whether there is a natural easement running to the public for flood control purposes across private property so as to subordinate the interest of the owner of that property and his right to maintain improvements thereon, which would permit the public to dispossess the land owner or the facilities without just compensation was flatly answered by the District Court as follows:

> "We are satisfied that there is no 'natural easement' across private property along a ditch or drainway in favor of the Flood Control District or other governmental authority for the purpose of constructing public works."

The respondents maintained their pipeline within a private easement and it is well settled that an easement is private property and therefore cannot be taken without just compensation.

It borders on the extreme for the petitioner to recite the general flood conditions in the County of Los Angeles in a way which implies that the whole flood control program of the Flood Control District is in jeopardy unless the District is given a completely free hand.

We therefore submit that there is no violation of any constitutional provision involved in this case and no conflict with any decision of the Supreme Court of the United States. The matter which the petitioner asks the Court to review is one of local importance and the decisions of the courts below were based upon state law. The respondents believe that there is no important federal question involved, such as urged by the petitioner. The petitioner has attempted to interject statutes which were not reviewed by the lower courts, a new theory of law and a discussion of general flood control problems in California, none of which is pertinent, and do not convert what the respondents believe to be a correct decision in a simple case into an important question of federal law.

For the foregoing reasons, it is respectfully submitted that this petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorneys for Respondents Southern California Gas Company and Southern Counties Gas Company of Califarnia.

APPENDIX A.

Opinion of the Superior Court.

In the Superior Court of the State of California in and for the County of Los Angeles.

Southern California Gas Company, a corporation, and Southern Counties Gas Company of California, a corporation, Plaintiffs, vs. Los Angeles County Flood Control District, a body Corporate and Politic, Defendant. No. 659-797.

MEMORANDUM RULING.

This case presents a question of first impression in this State. The question is whether a public utility may be required by a Flood Control District to remove and relocate at its own cost its underground gas transmission pipe lines along with certain facilities located upon or under land wherein it had acquired an easement from the fee-simple owner. The District did not seek to condemn the property, as it might have done, but on the contrary proceeded on the theory that as the pipe line and its facilities were located within the boundaries of a natural watercourse it could deepen, widen and extend the channel for the benefit of the public, without compensation to the plaintiff utilities. In short and in effect, the District predicates its right on the theory that it is exercising its police power or in any event that it has succeeded to the alleged right of the public to have the watercourse kept open and if necessary enlarged to carry any amount of surface and flood waters channeled by it so as to avoid damage to properties within the district.

The contention appears to overlook the fact that even the State or a municipality may not deepen and widen a natural watercourse so as to throw a greater volume of water on the property of a downstream owner without the payment of due compensation, nor may it widen and deepen the existing drainage ditch without paying compensation to the abutting landowners. A so-called watercourse more accurately described as a drainage ditch which began as a natural route to carry surface and storm waters will quite naturally increase in depth and width as a locality becomes more and more densely populated. But it can hardly be said that the government, through its agencies, may artifically widen and deepen the ditch so as to protect the landowners in a watershed by taking the abutting lands without compensation.

Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413, 415, 416, said: "As long recognized, some values are enjoyed under an implied limitation and must yield to police power. But obviously the implied limitation must have its limits, or the absolute contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act." So in the instant case it would seem that the police power cannot be stretched by the defendant to the point of requiring the plaintiff to remove and re-establish the facilities upon ground which it had procured and leased from the fee title owner many years ago.

It is of course true, as defendant contends, that there is a ditch which carries off water, and that this ditch has been formed over the years because of the natural drainage of surface and storm waters is of course true. But this does not give to defendant District by virtue of the police power the right to use that power so as to avoid paying compensation. In my view, compensation is due and payable.

For that reason judgment is ordered for the plaintiffs in the amount stipulated as the cost of removal of the structures involved.

Dated August 29, 1957

CLARENCE M. HANSON,

Judge.

APPENDIX B.

Opinion of the District Court of Appeal.

[Civ. No. 23356. Second Dist., Div. One. Apr. 24, 1959.]

Southern California Gas Company (a Corporation) *et al.*, Respondents, v. Los Angeles County Flood Control District, Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County. Clarence M. Hanson, Judge. Affirmed.

Proceeding in inverse condemnation against a flood control district to recover the cost of relocating a gas pipeline. Judgment for plaintiffs affirmed.

Harold W. Kennedy, County Counsel, Baldo M. Kristovich, Assistant County Counsel, Ivar E. Skjeie and Edward H. Gaylord, Deputies County Counsel, for Appellant.

T. J. Reynolds, L. T. Rice, Allen L. Cleveland and C. R. Salter for Respondents.

WHITE, *P. J.*—Southern California Gas Company and Southern Counties Gas Company of California, corporations, hereinafter referred to as the "Gas Companies," brought this action in inverse condemnation against the Los Angeles County Flood Control District, a body corporate and politic, hereinafter referred to as the "District," to recover $6,660.98, the cost of relocating their 30-inch high pressure gas pipe in a 20-year right-of-way easement therefor granted to them by the Pacific Electric Railway, the owner of the fee simple title to the land since 1906. The District appeals from judgment for the Gas Companies.

August 25, 1953, the District entered into an agreement with the county of Los Angeles, in which it is recited that the issuance of its bonds "for the control of surface waters by the construction of storm drains and drainage channels has been authorized," and the county agreed "to proceed with the work of preparing final construction plans and specifications for the construction of those storm drain projects herein described . . .," including East Whittier Storm Drain Project Number 29, out of which the instant action arose, and to complete and deliver to the District said plans and specifications.

A portion of said county engineer's undated specifications describes said Project Number 29 as follows: "The work will extend in an easement, following the natural channel of La Canada Verde Creek, from a point approximately 90 feet southerly of Lambert Road to Second Street."

The District's specifications, its contract for construction, and the contractor's faithful performance bond refer to the project as "Construction of Storm Drain."

In 1954, the District advised the Gas Companies that the District planned to widen and deepen the ditch known as "East Whittier Storm Drain Project No. 29," and requested that their pipeline be relocated at their own expense "under the terms of its permit or franchise." The Gas Companies advised the District that the pipeline was within their own private easement. Then the District, by letter dated March 11, 1955, advised the Gas Companies that, although their pipeline is situated in a private easement, "it crosses a natural drain along which this project will be constructed," and that in the case of "natural drains such as this the public enjoys a natural easement which by its nature would predate any private easement,"

and that consequently the burden of relocating the pipeline was upon the owner of the private easement.

May 24, 1955, pursuant to authorization by the board of supervisors, an agreement for "Easement for Storm Drain" across said land belonging to the Pacific Electric Railway Company was signed and acknowledged by the Railway and the District, "subject to all valid existing contracts, leases, liens, or encumbrances which may affect the property and the word 'grant' as used herein shall not be construed as a covenant against the existence of any thereof." The District, as consideration for said easement, promised to reimburse the Railway for any and all costs and expenses incurred in connection with changes required because of the construction of the said storm drain.

The Gas Companies' "Underground Pipe and Ditch Crossing" agreement with the Railway is dated August 31, 1946, and covers the agreed term of 20 years.

The District and the Gas Companies, under date of May 1, 1955, entered into a *status quo* agreement reciting that "the installation by the District of the Storm Drain . . . will necessarily conflict with an existing 30 inch pipeline . . .," and that a controversy exists between them as to which should bear the cost of relocation of said pipeline. Pursuant to said *status quo* agreement, the Gas Companies relocated their pipeline at a cost to them of $6,660.98.

It appears from the photographic exhibits, maps and drawings of the locale, and was found by the court, that Storm Drain Project Number 29 was designed and constructed to "carry off surface rain water run off from the northern slope of the Puente Hills." It was further found that said Project Number 29 is an artificial im-

provement of a natural watercourse; that, while the stream bed of La Canada Verde Creek is better defined north of Whittier Boulevard than in the vicinity of the Gas Companies' said pipeline, nevertheless, as shown by the United States Geological Survey Maps and other evidence including photographs showing railroad trestles over it and culverts and ditches along its course, the portion of the stream bed being considered on this appeal has long been existent; that although the pipeline of the Gas Companies was well below the ground when installed, the flow of waters in said creek so eroded said channel that before its relocation said pipeline was protruding "above the bed or flow line of La Canada Verde Creek"; and that it was necessary that said pipeline be relocated.

The District's justification of its refusal to pay the costs of the Gas Companies in moving their said pipeline is based primarily upon its claim that every owner of land (or of an easement over land) which is a part of, or immediately adjacent to "a natural watercourse or drainway" owns it subject to "a natural right of the public to utilize such natural facility," to there construct "reasonable artificial improvements for the drainage" of domestic waters and from time to time to deepen and improve such channel for that purpose; and subject to the requirement that any improvements placed by such owner upon said land or easement must from time to time be altered at his own expense as required by public agencies "in aid of the drainage of domestic waters in the drainway"; that the obligation and duty on the part of such owners of land and easements has been enforced as "a part of the retained sovereign or police power of the public exercisable by jurisdictional bodies or agencies, of which appellant is one"; that the public always owned the right to the unrestricted drainway and to enlarge it when and if such

enlargement is needed and all private ownership is subject to that right of the public.

That, if the state, of which appellant is the agent in the instant action, ever owned such an easement, it could not have been lost either by nonuser or by the agreement with the Railway for the "Easement for Storm Drain" hereinbefore described.

Therefore, the first issue to be considered on the instant appeal is the nature of appellant District's rights in the land belonging to Pacific Electric Railway Company and the easement granted by said Railway to the Gas Companies. Is such right, as stated in the grant of the "Easement for Storm Drain," subject to the Railway's prior valid and existing contract with the Gas Companies for "Underground Pipe and Ditch Crossing," or, is it, as urged by appellant, superior even to the rights of all riparian owners—including the Railway?

"Generally speaking, the bed of navigable rivers and streams belongs to the state. . . . If a stream or watercourse is not navigable, the bed is the private property of the riparian owners, and may not be taken for public use without compensation . . ." (25 Cal. Jur. 1046-1048; Freeman v. Bellegarde, 108 Cal. 179, 185 [41 P. 289, 49 Am. St. Rep. 76]; and People v. Elk River M. & L. Co., 107 Cal. 221, 224 [40 P. 531, 48 Am. St. Rep. 125].)

Appellant, in its opening brief, cites the following decisions of the California courts as authority for its statement that "the rule is universal that lands located in or along a watercourse are subject to a natural easement or servitude to receive all water naturally arising within the watershed or drainage area served and all of such waters

may be directed into such watercourse by artificial means . . . ."

In San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392 [188 P. 554, 9 A. L. R. 1200], judgment for plaintiff for damage caused by the erosion of its property was reversed on appeal. A conduit constructed by the defendant in a natural wash carried water to a point over a mile above plaintiff's property and there returned said water to the wash which crossed plaintiff's land. At page 406, the court said: 'It is apparently contended on behalf of the plaintiff that even if the injury be *damnum absque injuria* as between private parties, yet when the injury is inflicted by an improvement made by public authority, it must be compensated for under the provision of our constitution (Art. I, § 14) that private property shall not be taken or damaged for a public use without just compensation. But the contrary has been directly decided since the filing of the original briefs in this case in Gray v. Reclamation District, 174 Cal. 622 [163 P. [1021] 1041]."

The San Gabriel case, *supra*, Gray v. Reclamation District, cited therein *supra*, Archer v. City of Los Angeles, 9 Cal. 2d 19, [119 P. 2d 1], and Bauer v. County of Ventura, 45 Cal. 2d 276 [289 P. 2d 1], cited in appellant's opening brief, concern temporary flooding, or probable flooding, of lower lands riparian to a stream in which changes were made or planned by defendants for the purpose of flood prevention. They involve no taking or damaging of private property as part of the actual construction of public works. Not one of said above cited cases lends credence to appellant's claim that the Flood Control District has a "natural easement" along every natural drainway or ditch, which may be deepened, widened, ce-

mented, covered, opened or changed at will, regardless of and without payment for damage to or destruction of any prior improvements over, across or near said drainway or ditch.

In the instant action, plaintiffs' 30-inch high pressure gas pipe had been installed in their own private easement below the bed of the natural drainway. Appellant District, for the improvement of said drainway, required plaintiffs to, and they did, permit defendant to build a cement conduit across the easement of respondent Gas Companies, wider and deeper than said drainway had been. In connection with the construction of said conduit, said gas pipe was necessarily removed from its then position beneath the bed of said drainway and reconstructed across the top of said cement conduit and beneath the surface of the ground. Said relocation was done pursuant to defendant's demands in connection with its construction of said "East Whittier Storm Drain Project No. 29."

In the Bauer case, *supra*, where plaintiff sought to recover damages to her riparian property caused by defendant's changing of the height of its ditch on property above that of plaintiff, judgment of dismissal was reversed with directions. At page 282, the court said: "California Constitution, article I, section 14, provides: 'Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court, for, the owner . . .

"The taking of private property by the state for a public use is universally recognized as one of the indisputable attributes of sovereignty . . . But the state must, except under special circumstances not here present, follow the constitutional procedure which requires the payment of compensation before the private owner is dis-

possessed of his property. When this requirement is not fully satisfied, an action will lie against the state to recover the value of the property so taken . . . .

"Section 14, however, is designed not to create new causes of action but only to give the private property owner a remedy he would not otherwise have against the state for the unlawful dispossession, destruction or damage of his property. The state is therefore not liable under this provision for property damage that is *damnum absque injuria*. If the property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14 . .

". . . . Hence it is clear that the ordinary taking of private property for the purpose of constructing storm drainage systems is a taking for a public use. The reasons for such a taking are obviously to provide adequate normal drainage, to control flood waters and to provide irrigation waters. The public becomes principally entitled to the use and enjoyment of the private property taken for such purposes." (P. 284.)

". . . It follows that the taking or damaging of private property for the maintenance of an existing public improvement involving a deliberate act which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole constitutes a taking or damaging of property for a public use and the owner of such property is entitled to compensation.

". . . Had the bank been raised during the original construction it would have been part of the over-all project and hence within the rule of Clement v. State Reclamation Board, *supra*, 35 Cal. 2d 628, and House v. Los Angeles County Flood Control Dist., *supra*, 25 Cal. 2d 384 . . ." (P. 285.)

The House and Clement cases, cited in the portion of the Bauer decision last above quoted, are both based upon the premise that "The construction of the public improvement is a deliberate action of the state or its agency in furtherance of public purposes. If private property is damaged thereby the state or its agency must compensate the owner therefor . . ." (Clement v. State Reclamation Board, 35 Cal. 2d 628, 641 [220 P. 2d 897].)

We are satisfied that there is no "natural easement" across private property along a ditch or drainway in favor of a Flood Control District or other governmental agency for the purpose of constructing public works.

The Gas Companies having been required by appellant District to move and reconstruct their pipeline in and along their own private easement across said drainway, appellant District and not the Gas Companies should pay the cost of such removal. Appellant District, under the act by which it was created, has the power to require obedience to its demands in its exercise of its right of eminent domain. That power, however, does not relieve said District of its obligation to pay for all property taken or damages caused by its construction of public works.

None of the facts appearing in the record in the instant action require or warrant any exercise by the District of the police power of the state.

Having determined that appellant was not the owner of its claimed "natural easement," the rights claimed by it as incidental to such "natural easement" become immaterial.

The judgment is affirmed.

FOURT, *J.*, and LILLIE, *J.*, concurred.

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IN THE

Supreme Court of the United States

October Term, 1959.
No. 281

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

vs.

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,
Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

Opening Statement.

The Los Angeles County Flood Control District, petitioner for a writ of certiorari, hereby replies to the brief of respondents in opposition.

In our petition we argued that a federal question was presented because Section 16 of the Los Angeles County Flood Control Act (petition, App. C, p. 23) empowered the petitioner district to require the respondents to relocate their pipe line, provided that "* * * just compensation therefor first be made, in the manner and to the extent required by the Constitution of the United States and the Constitution of California," and that the Dis-

trict Court of Appeal necessarily held that compensation was required by the Constitution of the United States. We rely, therefore, on that portion of paragraph (3) of Section 1257 of Title 26 of the Unietd States Code which provides, in part:

> "1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> "* * *
> "(3) By writ of certiorari * * * where any title [or] right * * * is specially set up or claimed under the Constitution * * * of * * * the United States."

Respondents claimed the right of reimbursement was given to them by the Fourteenth Amendment of the Constitution of the United States. Therefore a right was claimed under the Constitution of the United States. Paragraph (c) does not limit the right of review to cases where the right was claimed by the petitioner.

Respondents contend:

1. It must appear that the party bringing the case up for review intended to assert a federal right. (Brief of Respondents, p. 8.)

2. The decision of the District Court of Appeal was based upon an adequate non-federal ground. (Brief of Respondents, pages 6, 7, 9, 11.)

3. The Decision of the District Court of Appeal is correct. (Brief of Respondents, pp. 13-20.)

4. There is no important question of Federal law. (Brief of Respondents, pp. 20, 21.)

Avoiding, as far as possible, repetition of what we said in anticipation of these objections in our petition, we answer them in the order stated.

I.

The Power to Review Under (3) of Section 1257 May Be Exercised as Well Where the Federal Claim Is Sustained as Where It Is Denied.

At page 8 respondents say:

> "The petitioner has failed to cite a single federal right that was claimed by it and denied. * * *
>
> "It has been held that before the Supreme Court has jurisdiction to re-examine the final judgment of a state court, the averments must be clear and positive so as to place it beyond question *that the party bringing the case up for review* intended to assert a federal right." (Italics are respondents.)

Respondents cite five cases, the latest of which was decided in 1900. This rule was changed on December 23, 1914, by the enactment of 38 Statutes at Large, page 790, chapter 2. See the history of this statute by Justice Frankfurter and Mr. James M. Landis, in "The Business of the Supreme Court" (1927) pages 190-198.

Paragraph (2) of Section 1257 permits review by appeal:

> "* * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and *the decision is in favor of its validity.*" (Italics added.)

The omission of language similar to that italicized from paragraph (3) shows that under that paragraph it makes no difference whether the federal right was denied or sustained.

As recently as *Northwestern States Cement Co. v. Minnesota*, 358 U. S. 450, this Court granted certiorari and

reversed the judgment of the Supreme Court of Georgia which court had held a state statute unconstitutional as repugnant to the federal constitution.

Numerous other cases where this Court reviewed the judgments of state courts where the state courts held state statutes repugnant to the federal constitution are cited in footnote 6, page 32 of Wolfson & Kurland (*sub-nominee,* Robertson & Kirkham) Jurisdiction of the Supreme Court of the United States.

In *Barrows v. Jackson,* 112 Cal. App. 2d 534, 247 P. 2d 99, the District Court of Appeal of California sustained a "* * * right * * * specially set up or claimed under the Constitution * * * of * * * the United States," in refusing to grant a judgment for damages for the violation of a racial restrictive covenant. This Court granted certiorari, 345 U. S. 902. (Judgment was affirmed, 346 U. S. 249.)

Petitioner does not claim any right under the Constitution of the United States but respondents did, which right was sustained by the District Court of Appeal. It is to review that decision that we seek certiorari.

II.

The Decision of the District Court of Appeal Could Not Have Been Based Upon an Adequate Non-Federal Ground.

Respondents' contention to the contrary was anticipated and answered at pages 19-24 of our petition.

At page 8 of its brief Respondents seem to assume that we rely upon Section 13 of Article I of the State Constitution (Appendix C of our petition, p. 13). We did not do so, but anticipated that respondents might. Our argument on pages 19-22 was in anticipation that respond-

ents might argue that the judgment below was based on this provision. Since, at page 8 of their brief, the respondents assure us that neither they nor the District Court of Appeal relied on this section it can be dismissed from consideration. Respondents say (page 11) that the decision of the District Court of Appeal was based upon Section 14 of Article I of the California Constitution. (Appendix C of petition, pp. 13-15.)

As shown on pages 17 and 18 of our petition, the District Court of Appeal, itself, quoted language from both *Bauer v. County of Ventura*, 45 Cal. 2d 276 at 282, 289 P. 2d 1 at 5; and *San Gabriel Valley Country Club v. County of Los Angeles*, 182 Cal. 392 at 406, 188 Pac. 554 at 559, 560, 9 A. L. R. 1200 at 1210 (Appendix A of petition, pp. 6, 8, Appendix B of brief of respondents, pp. 9, 11) showing that Section 14 itself does not create a property right. Section 14 could not apply unless, independently of the provisions of that section, some other provision of either the California Constitution or the Constitution of the United States required that compensation be paid. Since respondents have assured us that the only provision of the California Constitution relied upon by the District Court of Appeal was Section 14 of Article I, necessarily it must have held that the payment of compensation was required by some provision of the Constitution of the United States.

In this case the respondents cited and relied upon the Fourteenth Amendment to the Constitution of the United States. [Clk. Tr. p. 5, lines 26-28; pp. 4, 25, and 31 of Respondent's Brief in District Court of Appeal, and p. 2 of Answer to Petition for Hearing.] The District Court of Appeal could not award a judgment to the respondents without deciding that the Fourteenth Amend-

ment required payment of compensation. In California the case could be cited as precedent under the doctrine of *stare decisis* as holding that the Fourteenth Amendment required the payment of compensation even though this amendment was not mentioned in the opinion. (*American River Flood Control District v. Sweet*, 214 Cal. 778, 782, 783, 7 P. 2d 1030 at 1032.

When a State Court necessarily denies or upholds a claimed right under the Constitution of the United States, it cannot deprive this Court of jurisdiction by omitting all mention of the United States Constitution in its opinion.

In *Schlemmer v. Buffalo, Rochester & Pittsburgh Railway Company*, 205 U. S. 1, Mr. Justice Holmes said, at page 11:

> "* * * if the question is duly raised and the judgment necessarily, or, by what appears, in fact involves such a decision, then this Court will take jurisdiction, although the opinion below says nothing about it. *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254. * * *."

In the cited case, Mr. Justice Brown said, at page 269:

> "* * * This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record, *or in the opinion*, if an adjudication of such question were necessarily involved in the disposition of the case by the state court. * * *." (Italics added.)

This rule was followed in *Williams v. Kaiser*, 323 U. S. 471 at 478; and *Dorchy v. Kansas*, 272 U. S. 306 at 309.

III.

The Judgment of the District Court of Appeal Is Contrary to a Decision of This Court.

At page 13 of their brief in opposition, the respondents say:

> "The Decisions of the Courts Below are Clearly Correct."

Respondents' reference to Section 14 of Article I of the California Constitution already has been answered.

At pages 14 and 15, respondents cite *Northern Natural Gas Co. v. Blue Earth County*, 233 Minn. 274, 47 N. W. 2d 106. As appears at page 111 (of 47 N. W. 2d) the Court there relied upon a statute which the court construed as requiring the payment of compensation, even though, in the absence of such a statute, compensation would not be due. The statute was construed so as to have the same effect as the Marin County Flood Control and Water Conservation Act which is noted in *Los Angeles County Flood Control Dist. v. Southern California Edison Co.*, 51 Cal. 2d 331 at 337, 333 P. 2d 1 at 4, the Court saying that the Act:

> "'* * * provides that the district shall 'in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles, of any public utility which is required to be moved to a new location . . .' (Stats. 1953, Ch. 666, p. 1915, 1919; West, Water Code—Appendix, Secs. 68-5 (13); 1 Deering's Wat. Code, Act 4599, subd. 13.) * * *."

The California Court then pointed out that, in contrast to the Marin Act, the Los Angeles County Flood Control

Act did not require payment by the District for the relocation of utility facilities, unless required by the Constitution..

In *Northern Natural Gas Co. v. Blue Earth County, supra,* the Court (47 N. W. 2d at 111) cited with approval its former decision, *Chicago, M. & St. P. Ry. Co. v. Sprague,* 140 Minn. 1, 167 N. W. 124; and *Chicago B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Com's,* 200 U. S. 561, both of which held that the public utility must move its facilities at its own expense if such relocation was necessitated by the improvement of a natural watercourse.

The only reported case which we have found, and the only one cited by respondents consistent with the decision of the District Court of Appeal is *Cities Service Gas Co. v. Riverside Drainage District,* 137 Kan. 410, 20 P. 2d 520.

In that case the court neither cited nor discussed *Chicago B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Com'rs, supra,* or the cases cited at page 14 of our opening brief.

Even if, despite these considerations, the case were of any value as an interpretation of state law, as to the federal question involved it is directly contrary to the decision of this Court in *Chicago, B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Com'rs, supra.*

At page 26 of our petition we have anticipated and answered the argument which the respondents make at pages 17 and 18 of their brief in opposition that *Chicago, B. & Q. Ry. Company v. State of Illinois ex rel. Drainage Com'rs, supra,* 200 U. S. 561 is not in point. The fact that in that case, review was sought from a decision

denying the constitutional right, no longer is a valid distinction, since this Court has the jurisdiction to review where the State court decides in favor of the federal right as well as where it denies it.

The fact, as noted by respondents at the bottom of page 19 of their brief, that the petitioner agreed to pay the railroad for the cost of its relocation is immaterial. The respondents themselves at page 4 of their brief in opposition point out that the District purchased an easement from the railway and:

> "* * * as consideration for said easement, promised to reimburse the Railway for any and all costs and expenses incurred in connection with changes required because of the construction of the said storm drain."

We do not concede, of course, that if the District pays an unfounded claim which it does not owe to one person it must pay the claim of every other person based on the same theory, but, here, the record does not show that the District conceded that a claim similar to that of the respondents was valid.

IV.

There Is an Important Question of Federal Law.

That the question of federal law involved is important we believe we have demonstrated at pages 7-11 of our petition. That the question is not of mere local importance in the State of California is shown by the fact that the same question appears in the reported cases of:

Illinois: *People v. Peeler*, 125 N. E. 306; *Dittmer v. Ill. Terminal R. Co.*, 287 Ill. 513, 123 N. E. 37.

Iowa: *Mason etc. v. Board, etc., Wright County*, 144 Iowa 10, 121 N. W. 39; *Chicago R. v Drainage Dist. No. 5*, 121 N. W. 193.

Kansas: *Cities Service Gas Co. v. Riverside Drainage District, supra*, 137 Kan. 410, 20 P. 2d 520.

Minnesota: *Chicago, M. & St. P. Ry. Co. v. Sprague, supra*, 140 Minn. 1, 167 N. W. 124.

Tennessee: *Nashville, etc. v. Middle etc.* 261 S. W. 975.

The fact that, in reported opinions, the appellate courts of two states (California, in this case, and Kansas in *Cities Service Gas Co. v. Riverside Drainage District, supra,*) have ignored the decision of this Court and held contrary thereto, necessitates that the law as laid down by this Court in *Chicago, B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Com'rs. supra*, 200 U. S. 561 be definitely and unequivocally reaffirmed.

Respectfully submitted,

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